

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



74-2336

United States Court of Appeals

FOR THE SECOND CIRCUIT

CBS INC.,

*against* Plaintiff-Appellant,

STOKELY-VAN CAMP, INC.,

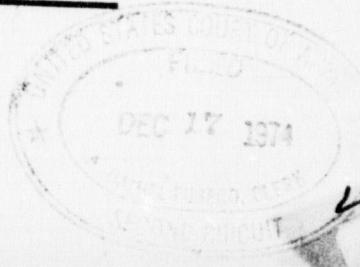
*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

CRAVATH, SWAINE & MOORE,  
Attorneys for Plaintiff-Appellant,  
One Chase Manhattan Plaza,  
New York, N. Y. 10005

LORD, DAY & LORD,  
Attorneys for Defendant-Appellee,  
25 Broadway,  
New York, N. Y. 10004



**PAGINATION AS IN ORIGINAL COPY**

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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CBS INC.,

*Plaintiff-Appellant,*

*—against—*

STOKELY-VAN CAMP, INC.,

*Defendant-Appellee.*

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**Relevant Docket Entries**

<u>Date</u>	<u>Filings-Proceedings</u>
4/25/72	Complaint filed. Summons issued.
5/15/72	Summons returned and filed.
5/26/72	Answer filed.
3/ 8/74	Filed pltff's notice of motion for summary judgment, stipulation of fact, statement pursuant to Rule 9(g) and memorandum in support of pltff's motion (volumes of exhibits subsequently filed).
3/ 8/74	Deposition of W. Marcus Newberry dtd 6-26-73 filed.
3/ 8/74	Deposition of Louis J. Rauchenberger dtd 6-27-73 filed.
3/ 8/74	Deposition of Louis W. Werle dtd 8-15-73 filed.
3/ 8/74	Deposition of Marvin Schrager dtd 8-16-73 filed.
3/ 8/74	Deposition of John Ginway dtd 9-19-73 filed.
4/ 4/74	Filed deft's notice of cross-motion for summary judgment, affidavits and memorandum in support of deft's motion, supplemental stipulation of fact deft's statement pursuant to Rule 9(g).
4/ 4/74	Pltff's reply memorandum filed.
8/30/74	Filed opinion and order of Wyatt, J. denying pltff's motion and granting deft's cross-motion.
9/ 5/74	Filed judgment that deft have judgment against pltff dismissing the complaint.
10/ 4/74	Filed notice of appeal.
11/12/74	Filed notice of certification and transmittal of record on appeal.

**Summons**

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No.

COLUMBIA BROADCASTING SYSTEM, INC.,

*Plaintiff,*

*v.*

STOKELY-VAN CAMP, INC.,

*Defendant.*

To the above named Defendant:

You are hereby summoned and required to serve upon CRAVATH, SWAINE & MOORE, plaintiff's attorneys, whose address is One Chase Manhattan Plaza, New York, New York 10005, an answer to the complaint which is herewith served upon you, within 30 days after service of this summons upon you is complete (N. Y. CPLR § 308(4)), exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON,  
Clerk of Court.

/s/ E. A. BECKER,  
Deputy Clerk.

Dated: April 25, 1972

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

**Complaint**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

*Plaintiff,**—against—*

STOKELY-VAN CAMP, INC.,

*Defendant.*

72 Civ.

Plaintiff, for its complaint herein, states:

1. This is an action for breach of contract and the matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs. The jurisdiction of this Court is based on 28 U. S. C. § 1332(a).
2. Plaintiff is, and at all times herein mentioned was, a corporation organized under the laws of the State of New York and a citizen of that state, with its principal office in the Southern District of New York.
3. Defendant is, and at all times herein mentioned was, a corporation organized under the laws of the State of Indiana and a citizen of that state, with its principal office in Indianapolis, Indiana, and subject to jurisdiction in the Southern District of New York.
4. Plaintiff is, and at all times herein mentioned was, engaged in the businesses, among others, of operating (a) five television stations, owned by it, each of which broadcasts programs locally over its facilities, and (b) a television network, which transmits television programs to those five television stations and, pursuant to affiliation agreements, to approximately 190 independently owned and operated television stations.
5. Plaintiff is, and at all times herein mentioned was, also engaged in selling to advertisers the right to have their commercial announcements broadcast in association with programs on the broadcasting facilities of plaintiff's own television stations and of

*Complaint*

those of its affiliated stations which accept programs transmitted by plaintiff's television network.

6. At all times herein mentioned, Lennen & Newell, Inc., a New York advertising agency, was the authorized agent of defendant in arranging for the procurement of time spots for the telecasting of commercial messages advertising defendant's products.

7. Lennen & Newell, Inc., acting on behalf of defendant, entered into fifteen separate contracts with plaintiff for the telecasting of commercial messages advertising defendant's products. Two of those contracts, dated April 9, 1971, and April 12, 1971, respectively, were with respect to available time spots during the telecasting of programs broadcast over plaintiff's television network. The remaining thirteen contracts, dated December 10, 1970 (two contracts), December 16, 1970, January 7, 1971, February 11, 1971, April 7, 1971, April 14, 1971, May 28, 1971 (two contracts), May 31, 1971, August 30, 1971, September 13, 1971, and September 20, 1971, respectively, were with respect to available time spots during the telecasting of programs broadcast by television stations owned and operated by plaintiff in Philadelphia, Chicago, St. Louis and Los Angeles.

8. Commercial messages advertising defendant's products were broadcast by plaintiff in accordance with the terms of the aforementioned contracts.

9. For the services rendered, defendant promised to pay plaintiff the charges specified in the aforementioned contracts, after deduction by the advertising agency of its 15% commission. The charges incurred by defendant in connection with the two network contracts totalled \$261,684.00 and the charges incurred by defendant in connection with the thirteen station contracts totalled \$166,813.33, which amounts are now due and owing plaintiff.

10. Plaintiff, before this action, demanded of defendant payment of the \$428,497.33 remaining due, but defendant has wrongfully refused to pay and no part of that amount has been paid to plaintiff by defendant.

WHEREFORE, plaintiff demands judgment against defendant in the amount of \$428,497.33, together with interest and the costs and disbursements of this action.

April 24, 1972

CRAVATH, SWAINE & MOORE,

by BRUCE BROMLEY  
(A member of the firm)

*Attorneys for Plaintiff,*  
One Chase Manhattan Plaza,  
New York, N. Y. 10005  
(212) 422-3000

**Answer**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
*Plaintiff*,  
—against—  
STOKELY-VAN CAMP, INC.,  
*Defendant.*

72 Civ. 1687

The defendant, Stokely-Van Camp, Inc., by its attorneys, Lord, Day & Lord, for its answer to the complaint alleges upon information and belief:

**FIRST:** Denies that it has knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered 1, 2, 4 and 5 of the complaint.

**SECOND:** Denies that it has knowledge or information sufficient to form a belief as to the allegation contained in paragraph numbered 3 of the complaint that the defendant is subject to jurisdiction in the Southern District of New York.

**THIRD:** Denies the allegations contained in paragraphs numbered 6, 7, 8, 9 and 10 of the complaint.

**First Defense**

**FOURTH:** Defendant has paid to the plaintiff or to one Lennen & Newell, Inc. (hereinafter "L & N"), a New York corporation, on plaintiff's behalf all of the sums claimed in the complaint.

**Second Defense**

**FIFTH:** Plaintiff is estopped from maintaining this cause of action by reason of its conduct as hereinafter set forth.

**SIXTH:** The contracts referred to in paragraph numbered 3 of the complaint were entered into between plaintiff and L & N and defendant was not a party to nor did it approve or authorize

*Answer*

such contracts insofar as they may have purported to obligate defendant to make any payments due thereunder to plaintiff.

SEVENTH: Prior to the time that plaintiff entered into arrangements with L & N for the telecast of commercial announcements for defendant's products plaintiff knew that the agreements between defendant and L & N provided that all payments for such telecasts were to be made by defendant to L & N on behalf of plaintiff.

EIGHTH: Payments for all such telecasts were made by defendant to L & N as and when they became due pursuant to the arrangements for such telecasts between plaintiff and L & N and plaintiff knew of such payments.

NINTH: Unknown to defendant, and in violation of its obligations to both plaintiff and defendant, L & N failed to remit such payments to plaintiff.

TENTH: Plaintiff knew or should have known that L & N was continuously violating its obligations to remit such payments to plaintiff and plaintiff also knew or should have known that defendant was without any such knowledge.

ELEVENTH: Despite plaintiff's knowledge of (a) such payments by defendant to L & N, (b) L & N's failure to remit same to plaintiff and (c) defendant's lack of knowledge of such failure, plaintiff failed to notify defendant of such failure by L & N and also failed to make any demand for payment from plaintiff; instead, plaintiff continued from time to time to enter into further arrangements with L & N for the telecast of additional announcements for defendant's products and unilaterally and without the knowledge or consent of or notice to defendant extended L & N's time to remit the sums owing to plaintiff from L & N and otherwise modified the terms of L & N's obligations to plaintiff.

TWELFTH: At no time prior to the commencement of this action did plaintiff claim or otherwise notify defendant that the aforesaid payments by defendant to L & N did not constitute payment to plaintiff for the telecasts for defendant's products or that L & N's failure to remit such payments to plaintiff constituted a violation of any obligation on the part of defendant owing to plaintiff; on the contrary, plaintiff by its conduct, acquiesced in and consented to defendant's payments to L & N as constituting payments to plaintiff and plaintiff continued to solicit, encourage

*Answer*

and enter into further arrangements with L & N providing for telecasts of defendant's products without protest to defendant, thereby inducing defendant to advertise such products over plaintiff's facilities at considerable expense to defendant and to pay all moneys due and owing for such advertising to L & N in the belief that such payment constituted a complete discharge and release of the obligations, if any, of defendant to plaintiff.

WHEREFORE, defendant demands judgment dismissing the complaint, together with its costs and disbursements and such other and further relief as to the Court may seem just and proper.

Dated: New York, New York  
May 25, 1972

LORD, DAY & LORD  
*Attorneys for Defendant*

JOHN J. LOFLIN  
Office and Post Office Address  
25 Broadway  
New York, New York 10004  
(212) 344-8480

### **Stipulation**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
Plaintiff,  
—against—  
STOKELY-VAN CAMP, INC.,  
Defendant. } 71 Civ. 1687  
(IW)

IT IS HEREBY STIPULATED, for the purposes of this action only, that the facts set forth below are true:

1. The following definitions shall apply to this stipulation:
  - (a) "CBS": plaintiff Columbia Broadcasting System, Inc.
  - (b) "Stokely": defendant Stokely-Van Camp, Inc.
  - (c) "L&N": Lennen & Newell, Inc.
  - (d) "Primary Documentary Exhibits": a compilation of documents identified as Exhibits A through KK, submitted herewith.
  - (e) "Secondary Documentary Exhibits": a compilation of documents identified as Exhibits LL through WW submitted herewith.
2. CBS is a New York corporation with its principal office at 51 West 52nd Street, New York, N. Y.
3. Stokely is an Indiana corporation with its principal office in Indianapolis, Indiana, and is subject to jurisdiction in the Southern District of New York. It is engaged in the production, distribution and sales of various products throughout the United States and utilizes advertising, including television commercials, in connection with the promotion and sale of those products.
4. CBS is engaged in the business, among others, of operating (a) five television stations, owned by it, each of which broadcasts programs locally over its facilities, and (b) a television network, which transmits television programs to those five tele-

*Stipulation*

vision stations and, pursuant to affiliation agreements, to approximately 200 independently owned and operated television stations.

5. CBS is also engaged in selling time for commercial announcements broadcast in association with programs on the broadcasting facilities of CBS's own television stations and of those of its affiliated stations which accept programs transmitted by CBS's television network.

6. L&N, a New York advertising agency, had acted as Stokely's advertising agency for many years up until March 23, 1972 pursuant to an unwritten arrangement with Stokely.

7. L&N also prepared and sent to Stokely quarterly schedules which contained the station, date, program and time for each Stokely commercial that would be shown during the forthcoming three months on network television. Stokely forwarded those schedules to its sales force.

8. Prior to their broadcast, L&N also advised Stokely of the station, date and time for each Stokely commercial that would be shown locally by television stations.

9. L&N provided to CBS the commercials to which reference is made in Exhibits A through HH and those commercials were broadcast during the period December 27, 1970, through December 5, 1971, as scheduled by L&N, with the knowledge of L&N and Stokely.

10. Exhibits A through HH of the Primary Documentary Exhibits are copies of documents from the CBS files with respect to communications sent by it to L&N, or received by it from L&N, on the date indicated on each, respecting the broadcast by CBS of Stokely television commercials.

11. L&N forwarded its invoices to Stokely for the broadcast by CBS of Stokely television commercials. Exhibit 1 hereto sets forth the date and amount of CBS invoices to L&N that were rendered with respect to commercials broadcast during the period immediately preceding the transactions in suit and the commercials referred to in Exhibits A through HH and the date of any payments by L&N to CBS and Stokely to L&N, respectively, with respect to those invoices. No other payments have been made.

12. Exhibits II through KK of the Primary Documentary Exhibits are copies of documents from the CBS files with respect

*Stipulation*

to communications sent by it to Stokely or received by it from Stokely on the date indicated on each.

13. The documents identified as Secondary Documentary Exhibits are copies of documents from the CBS and Stokely files, respectively, on the date indicated on each.

October 31, 1973.

CRAVATH, SWAINE & MOORE,

by HAROLD R. MEDINA, JR.  
(A member of the firm)  
*Attorneys for plaintiff,*  
One Chase Manhattan Plaza,  
New York, N. Y. 10005.

LORD, DAY & LORD,

by JOHN J. LOFLIN  
(A member of the firm)  
*Attorneys for defendant,*  
25 Broadway,  
New York, N. Y. 10004.

**EXHIBIT 1**Schedule of Invoices from CBS and Payment by Stokely  
to Lennen and by Lennen to CBS\*

## NETWORK

<u>Invoice Date</u>	<u>Amount</u>	<u>Stokely Payment</u>	<u>Lennen Payment</u>
8/31/70	\$61,047		11/30/70
9/30/70	20,340		1/ 6/71
4/30/71	20,392		6/30/71
6/ 1/71	37,204		7/30/71
6/29/71	19,098	7/13/71	—
6/29/71	51,892	7/13/71	—
7/ 1/71	1,000	Paid—No Record of Date	—
8/ 2/71	64,260	8/ 6/71	—
8/ 2/71	36,125	8/ 6/71	—
8/ 2/71	1,875	Paid—No Record of Date	—
8/ 2/71	750	Paid—No Record of Date	—
9/ 2/71	68,821	9/ 7/71	—
9/ 2/71	20,442	9/ 7/71	—

## STATION

<u>Invoice Date</u>	<u>Amount</u>	<u>Stokely Payment</u>	<u>Lennen Payment</u>
10/30/70	\$12,070.00		4/ 2/71
10/30/70	5,168.00		5/10/71
12/ 5/70	12,282.00		7/ 9/71
12/ 5/70	5,168.00		7/ 9/71
1/ 2/71	7,140.00		7/ 9/71
1/ 2/71	3,400.00		Credit Issued in 3/71
1/ 2/71	1,054.00		Credit Issued in 3/71
2/ 5/71	10,200.00	2/11/71	—
2/ 5/71	2,728.50	3/ 5/71	—
2/ 5/71	2,409.75	3/ 5/71	—

\*CBS Network invoices dated prior to June 29, 1971, and CBS Station invoices dated prior to February 5, 1971, were rendered with respect to Stokely commercials broadcast pursuant to agreements other than those included in the Primary Documentary Exhibits and were incorporated herein to show the history of payments by Lennen to CBS for the period immediately preceding the transactions in suit. Stokely made a payment to Lennen with respect to each of those invoices.

*Exhibit 1*

<u>Invoice Date</u>	<u>Amount</u>	<u>Stokely Payment</u>	<u>Lennen Payment</u>
2/28/71	\$12,240.00	3/ 9/71	—
2/28/71	1,381.24	4/ 5/71	—
3/12/71	3,400.00	3/ 5/71	—
4/ 3/71	13,600.00	4/ 2/71	—
4/ 3/71	1,211.24	4/ 2/71	—
4/30/71	14,960.00	5/ 3/71	—
4/30/71	4,250.00	5/ 6/71	—
4/30/71	10,145.60	5/ 6/71	—
5/30/71	8,500.00	6/ 8/71	—
5/30/71	20,291.20	6/ 8/71	—
6/30/71	4,743.00	6/10/71	—
6/30/71	4,250.00	6/30/71	—
8/25/71	340.00	6/30/71	—
9/30/71	10,072.50	11/ 5/71	—
9/30/71	1,317.50	11/ 5/71	—
9/30/71	3,358.35	11/23/71	—
10/31/71	13,430.00	11/29/71	—
10/31/71	2,758.25	11/29/71	—
10/31/71	6,989.55	6/10/71	—
11/16/71*	12,512.00	12/21/71	—
11/30/71	188.70	12/21/71	—
12/31/71	1,535.95	2/17/72	—

\*Revised June 71 invoice.

**Supplemental Stipulation of Facts**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
Plaintiff,  
—against—  
STOKELY-VAN CAMP, INC.,  
Defendant.

72 Civ. 1687  
(IW)

IT IS HEREBY STIPULATED, for the purposes of this action only, that the facts set forth below are true:

- (1) That no sales representative of plaintiff at any time contacted any representative of Stokely-Van Camp with respect to the solicitation, negotiation or sale of broadcast time on plaintiff's owned and operated stations;
- (2) That the manner in which the sales force for plaintiff's owned and operated stations solicited, negotiated and sold broadcast time in 1970 and 1971 was substantially the same as that of the sales force for the plaintiff's sales of broadcast time on its network, as outlined by John Ginway in his deposition in this action, taken on September 19, 1973.

Dated: New York, New York  
April 2, 1974

CRAVATH, SWAINE & MOORE

By HAROLD R. MEDINA, JR.  
(A Member of the Firm)  
*Attorneys for Plaintiff*  
One Chase Manhattan Plaza  
New York, New York 10005

LORD, DAY & LORD  
By JOHN J. LOFLIN  
(A Member of the Firm)  
*Attorneys for Defendant*  
25 Broadway  
New York, New York 10004

**Notice of Motion**

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,	{	72 Civ. 1687 (IW)
<i>Plaintiff,</i>		
—against—		}
STOKELY-VAN CAMP, INC.,	<i>Defendant.</i>	

PLEASE TAKE NOTICE, that upon the pleadings filed herein, the stipulation between the parties of October 31, 1973 and Exhibit 1 thereto, annexed hereto, the Primary Documentary Exhibits referred to in that stipulation, filed herein, the Secondary Documentary Exhibits referred to in that stipulation, filed herewith, and the depositions of W. Marcus Newberry, Louis J. Rauchenberger, Louis W. Werle, Marvin Schrager and John Ginway, filed herewith, plaintiff will move this Court, at Room 1106 of the Federal Courthouse, Foley Square, New York, New York, on the 5th day of April, 1974, at 2:30 P.M. in the afternoon or as soon thereafter as counsel can be heard, for an order directing that summary judgment be entered in favor of plaintiff for \$428,497.33, with interest at 6% from February 23, 1972, on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law, and for such other and further relief as the Court may deem just and proper.

March 5, 1974.

CRAVATH, SWAINE & MOORE,  
*Attorneys for Plaintiff,*  
 One Chase Manhattan Plaza,  
 New York, N. Y. 10005.  
 Tel. 422-3000.

by HAROLD R. MEDINA, JR.  
 (A Member of the firm)

To:

LORD, DAY & LORD,  
*Attorneys for Defendant,*  
 25 Broadway,  
 New York, N. Y. 10004.

**Plaintiff's Statement Pursuant to Rule 9(g) of this Court**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
*Plaintiff,*  
—against—  
STOKELY-VAN CAMP, INC.,  
*Defendant.*

71 Civ. 1687  
(IW)

Pursuant to Rule 9(g) of the General Rules of this Court, plaintiff submits the following statement of material facts as to which there is no genuine issue:

1. Plaintiff Columbia Broadcasting System, Inc. (CBS), is a New York corporation with its principal office at 51 West 52nd Street, New York, New York.
2. Defendant Stokely-Van Camp, Inc. (Stokely), is an Indiana corporation with its principal office in Indianapolis, Indiana, and is subject to jurisdiction in the Southern District of New York. It is engaged in the production, distribution and sale of various products throughout the United States and utilizes advertising, including television commercials, in connection with the promotion and sale of those products.
3. CBS is engaged in the business, among others, of operating (a) five television stations, owned by it, each of which broadcasts programs locally over its facilities, and (b) a television network, which transmits television programs to those five television stations and, pursuant to affiliation agreements, to approximately 200 independently owned and operated television stations.
4. CBS is also engaged in selling time for commercial announcements broadcast in association with programs on the broadcasting facilities of CBS's own television stations and of those of its affiliated stations which accept programs transmitted by CBS's television network.
5. Lennen & Newell, Inc. (L&N), a New York advertising agency, had acted as Stokely's advertising agency for many years up until March 23, 1972, pursuant to an unwritten arrangement with Stokely.

*Plaintiff's Statement Pursuant to Rule 9(g) of this Court*

6. L&N entered into fifteen separate contracts (the contracts) with plaintiff for the telecasting of commercial messages advertising Stokely's products. Two of those contracts, dated April 9, 1971, and April 12, 1971, respectively, were with respect to available time spots during the telecasting of programs broadcast over plaintiff's television network. The remaining thirteen contracts, dated December 10, 1970 (two contracts), December 16, 1970, January 7, 1971, February 11, 1971, April 7, 1971, April 14, 1971, May 28, 1971 (two contracts), May 31, 1971, August 30, 1971, September 13, 1971, and September 20, 1971, respectively, were with respect to available time spots during the telecasting of programs broadcast by television stations owned and operated by CBS in Philadelphia, Chicago, St. Louis and Los Angeles. Copies of the contracts and correspondence and invoices relative thereto appear as Exhibits A through HH in the Primary Documentary Exhibits on file in this Court.

7. Stokely requested L&N to arrange for broadcast of the commercials referred to in the contracts and L&N's action in entering into the contracts was pursuant to those requests. The contracts all stated explicitly that L&N was "acting as agent for Stokely-Van Camp, Inc."

8. Stokely had knowledge, during the period December 1970 through November 1971, that L&N was transacting business with various broadcast media, including CBS, in order to effectuate, at Stokely's behest, the appearance of commercial announcements on television advertising Stokely products.

9. Prior to December 1971 Stokely had no knowledge of, and did not communicate with CBS or L&N concerning, the nature of the contractual arrangements being entered into by L&N in order to effectuate the appearance of commercial announcements on television advertising Stokely products.

10. L&N provided to CBS the commercials to which reference is made in Exhibits A through HH and those commercial messages advertising Stokely's products were broadcast by CBS during the period December 27, 1970, through December 5, 1971, as scheduled by L&N, with the prior knowledge of L&N and Stokely, and Stokely received the benefit of those commercials.

11. L&N forwarded its invoices to Stokely for the broadcast by CBS of Stokely television commercials. The charges

*Plaintiff's Statement Pursuant to Rule 9(g) of this Court*

incurred by Stokely in connection with the two network contracts totaled \$261,684.00, and the charges incurred by Stokely in connection with the thirteen station contracts totaled \$166,813.33.

12. The various sums due to CBS were paid by Stokely to L&N, but L&N did not pay CBS. L&N is now in bankruptcy.

13. L&N was authorized by Stokely to enter into the contracts on behalf of Stokely.

14. L&N had apparent authority, at the time of the contracts, to enter into the contracts on behalf of Stokely.

15. Stokely ratified L&N's actions in entering into the contracts on behalf of Stokely.

16. Stokely is estopped to deny that L&N had authority to enter into the contracts on behalf of Stokely.

17. Prior to December 1971, Stokely never took any steps to insure that monies paid by it to L&N with respect to invoices forwarded to it for broadcasts by CBS pursuant to the contracts were promptly and properly forwarded by L&N to CBS or to ascertain whether monies paid by it to L&N with respect to invoices forwarded to it for broadcasts by CBS pursuant to the contracts were being segregated by L&N and not being commingled with L&N's own assets or applied to other uses by L&N. Stokely neither contracted with L&N for an audit nor actually conducted any audit of L&N's books until after January 1972.

18. All payments by Stokely to L&N with respect to CBS network broadcasts were completed by September 7, 1971 and all payments by Stokely to L&N with respect to CBS station broadcasts were completed by June 30, 1971 with the exception of two payments totalling \$11,390 on November 5, 1971, one payment of \$3,358.35 on November 23, 1971, three payments totalling \$23,177.80 on November 29, 1971, one payment of \$188.70 on December 21, 1971 and one payment of \$1,535.95 on February 17, 1972.

19. In September and October 1971, L&N falsely represented to CBS that it had advised Stokely of L&N's financial position and likewise falsely represented to CBS that Stokely had paid to it all amounts due under the contracts. CBS believed those representations and relied on them.

*Plaintiff's Statement Pursuant to Rule 9(g) of this Court*

20. At all times prior to late November and early December 1971, CBS expected that L&N would pay to it all sums due under the contracts.

21. In December 1971 CBS for the first time received information which led it to believe that L&N's financial position was precarious. Stokely received similar knowledge at approximately the same time. L&N filed a petition in bankruptcy in this Court on February 2, 1972.

22. On February 23, 1972 CBS demanded of Stokely that it pay to CBS \$428,497.33 due to CBS for performance of the contracts for the benefit of Stokely. Stokely refused that payment on March 12, 1972. Copies of that correspondence appears as Exhibits II through KK in the Primary Documentary Exhibits.

This action was commenced on April 25, 1972.

March 5, 1974.

CRAVATH, SWAINE & MOORE,  
One Chase Manhattan Plaza,  
New York, New York 10005.  
*Attorneys for Plaintiff.*

by HAROLD R. MEDINA, JR.  
(A member of the firm)

**Notice of Cross-Motion**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, INC., <i>Plaintiff,</i> —against— STOKELY-VAN CAMP, INC., <i>Defendant.</i>	72 Civ. 1687 (I.W.)
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SIRS:

PLEASE TAKE NOTICE that, upon the pleadings filed herein, and upon the Stipulation between the parties of October 31, 1973, and the Primary and Secondary Documentary Exhibits referred to in said Stipulation, and the depositions of W. Marcus Newberry, Louis J. Rauchenberger, Louis W. Werle, Marvin Schrager and John Ginway, all of which have been filed by plaintiff on its motion for summary judgment herein, and upon the affidavits of W. Marcus Newberry, John D. Speirs and J. Lewis Ames, each sworn to April 1, 1974, and the Supplemental Stipulation between the parties dated April 2, 1974, annexed hereto, defendants will cross-move this Court, at Room 1106 of the Federal Courthouse, Foley Square, New York, New York on the 5th day of April, 1974 at 2:30 p.m. in the afternoon or as soon thereafter as counsel can be heard, for an order directing that summary judgment be entered in favor of defendant, dismissing the complaint herein, on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
April 3, 1974

LORD, DAY & LORD  
By JOHN J. LOFLIN  
(A Member of the Firm)  
*Attorneys for Defendant*  
25 Broadway  
New York, New York  
(212) 344-8480

TO: CRAVATH, SWAINE & MOORE  
One Chase Manhattan Plaza  
New York, New York 10005

**Defendant's Statement Pursuant to Rule 9(g) of this Court**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
Plaintiff,  
—against—  
STOKELY-VAN CAMP, INC.,  
Defendant.

72 Civ. 1687  
(IW)

Pursuant to Rule 9(g) of the General Rules of this Court, defendant submits the following statement of material facts as to which there is no genuine issue:

1. Lennen & Newell, Inc. (L&N), an advertising agency, ordered from plaintiff the broadcast time which is the subject of this suit, for the showing of commercials advertising defendant's products.
2. L&N had no express authority to bind defendant to pay plaintiff for such broadcast time; the arrangement between defendant and L&N was for L&N to assume responsibility for such purchases.
3. Stokley exercised no control over L&N's selection of network, station, time or program for the showing of defendant's commercials.
4. CBS dealt solely with L&N with respect to the sale of the broadcast time which is the subject of this action.
5. CBS billed L&N for such broadcast time.
6. L&N billed defendant for such broadcast time and defendant paid L&N all sums billed.
7. During at least the latter part of 1970 and again beginning early in 1971 and increasingly so thereafter L&N was in arrears in payments due to CBS for such broadcast time.
8. During the latter part of 1970 and again in early 1971 plaintiff permitted and agreed to allow L&N to accumulate further arrears in its payments to plaintiff.

*Defendant's Statement Pursuant to Rule 9(g) of this Court*

9. From at least the latter part of 1970 until February 1972 CBS was familiar with the financial condition of L&N.

10. Plaintiff at no time contacted defendant with respect to L&N's financial condition, delinquencies or the extensions of time granted to L&N.

11. Stokeley had no knowledge of the arrangements or alleged "contracts" entered into between L&N and plaintiff until January 1972.

12. L&N filed a petition for reorganization under the bankruptcy laws on February 2, 1972.

13. Plaintiff first advised defendant of its intention to hold defendant liable for the cost of such broadcast time on February 23, 1972.

With respect to plaintiff's Statement under Rule 9(g), defendant cannot properly respond to paragraphs 13, 14, 15 and 16 thereof, inasmuch as they set forth conclusions of law. (It is defendant's position that these conclusions are not warranted from the facts herein.)

With respect to paragraph 19 of plaintiff's Statement defendant is not aware of any evidentiary support for the proposition that in September and October 1971, L&N falsely represented to CBS that it had advised *Stokely* of L&N's financial position although there is testimony from CBS to the general effect that L&N told CBS representatives that L&N had advised its *advertisers* of its financial position; whether it was proper for CBS to have given credence to such representations, if made, or to conclude without further inquiry that Stokely specifically had been advised of L&N's true financial position is a question for the Court. It is not disputed that in fact L&N did not advise Stokely of its true financial situation until January 13, 1972 and that CBS never apprised Stokely of L&N's financial problems. It is Stokely's position that even if the statements attributed to L&N were made to CBS, they were insufficient as a matter of law to relieve CBS of its responsibility to inform Stokely currently of the status of payments for Stokely's advertising if CBS intended at a later date to hold Stokely liable in the event of a default by L&N. Defendant cannot respond to the additional assertion of false representations by L&N that defendant had paid all amounts due under the contracts inasmuch as plaintiff does not indicate the amounts due or stated to be due at the time of the alleged representation. It is not disputed

*Defendant's Statement Pursuant to Rule 9(g) of this Court*

that defendant paid L&N in full for the cost of the CBS broadcasts in question nor is it disputed that L&N failed to pay the amount in suit to CBS.

With respect to paragraphs 20 and 21 of plaintiff's Statement, defendant cannot respond inasmuch as they are conclusory and ambiguous and refer to plaintiff's belief, expectations or state of mind, the reasonableness of which in the circumstances present issues of law for the Court.

April 3, 1974

LORD, DAY & LORD  
25 Broadway  
New York, New York 10004  
*Attorneys for Defendant*

By JOHN J. LOFLIN  
(A Member of the Firm)

**Affidavit of W. Marcus Newberry**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

*Plaintiff,**—against—*

STOKELY-VAN CAMP, INC.,

*Defendant.*

72 Civ. 1687

STATE OF INDIANA } ss.:  
COUNTY OF MARION }

W. MARCUS NEWBERRY, being duly sworn, deposes and says:

1. I am Vice President and Director of Marketing for the Canned Division of Stokely-Van Camp, Inc. (hereinafter "Stokely"). As Director of Marketing since early 1972, I have supervised Stokely's advertising for its Canned Division. From March 23, 1967 to January 31, 1972, I was Vice President of Product Planning and in that position I also had responsibilities in connection with such advertising and worked with the then Marketing Director. During those years, I worked extensively with personnel of Lennen & Newell, Inc. ("L&N") at various levels.

2. Stokely and L&N were associated as advertiser and agency for approximately 17 years pursuant to an arrangement which was never reduced to writing. L&N would work with Stokely in the review of marketing data supplied by Stokely each year, and suggest advertising activities which would fit into Stokely's needs for the coming year in the light of an advertising budget independently established by Stokely. The TV coverage, including spot and/or network TV, was based upon the particular type and number of consumers sought to be reached and advertising impressions sought to be made. This was decided upon and included in a marketing plan. A "buying platform" for TV coverage was thus established, solely in terms of gross rating points or time desired by Stokely, within the confines of its monetary budget and not in terms of specific programs, networks or stations.

*Affidavit of W. Marcus Newberry*

L&N would submit "estimates" of total expenditures, also in terms of gross coverage, and not specific programs, networks or stations.

3. Thereafter, L&N would place the actual TV portion of the advertising within the limits of the plan in accordance with the "buying platform." The selection of network, station, time and program was never dictated by Stokely and was entirely within L&N's responsibility. The only control exercised by Stokely over L&N's purchase was that Stokely would check the bills submitted by L&N against the advertising budget and the estimates of total cost for the fiscal quarter which L&N would submit with respect to TV broadcast buys. If the costs exceeded the estimates, Stokely would direct an appropriate adjustment in further purchases to stay within the limits of the annual monetary budget. L&N would also inform Stokely of any modification of the "estimates."

4. In the case of "spot" broadcasts, L&N would inform Stokely of its specific purchase only days before a broadcast. In the case of network programs, L&N gave somewhat more advance notice of the specific broadcast, usually 45 to 60 days.

5. Stokely's arrangement with L&N was for L&N to purchase media space or broadcast time on L&N's sole responsibility and credit, and not upon Stokely's credit or in its name. In this respect, in December 1971, upon being notified by a broadcast media company (General Electric Broadcasting, Inc.) that it had adopted a new contract under which it would look to Stokely and L&N jointly for any advertising placed with its station, Stokely immediately advised L&N not to place any further advertising with that company. (Copy of letter of General Electric Broadcasting Company, dated November 30, 1971, is annexed hereto as Exhibit A.) This was the first notice to Stokely of any claim for joint liability by media with whom L&N had placed Stokely advertising. Stokely wrote to L&N on December 8, 1971 to express its surprise and its refusal to accept responsibility. (Copy of letter of December 8, 1971 annexed hereto as Exhibit B.) On December 16, 1971, L&N responded. The import of that letter was that L&N, consistent with our understanding and with industry practices, was solely liable to its media creditors. L&N further represented that "our creditors accept that responsibility to them is ours alone and is in no way to be shared." (Copy of L&N's letter of December 16, 1971 is annexed as Exhibit C.)

*Affidavit of W. Marcus Newberry*

6. Stokely had no knowledge of the arrangements between L&N and CBS regarding L&N's purchase of TV broadcast time for Stokely advertisements from that network and owned and operated stations. Nor had Stokely any knowledge of the arrangements for payments made between L&N and CBS or the status of such payments. It was presumed, having heard nothing to the contrary, that L&N, having collected from Stokely, would make prompt payment to other media suppliers. (CBS at no time prior to February 1972 contacted Stokely to indicate it was not being paid currently.)

7. The first time that I was advised that L&N had contacted with CBS "as agent" for Stokely, and not solely on its own responsibility, and that moneys were owing by L&N for Stokely advertising, was on January 13, 1972 at the time L&N advised Stokely of its intention to file a petition in Chapter XI.

8. The first notice Stokely had that L&N was experiencing any financial problems was the indication in its December 16, 1971 letter that it had fallen behind in some payments but was then "paying all invoices currently" (Exhibit C). Stokely had no knowledge of the actual state of L&N's affairs until January 13, 1972 when L&N representatives came to Indianapolis and met with Stokely personnel. These representatives were Mr. John ("Jack") D. Speirs, Treasurer and Senior Vice President of L&N, J. Lewis Ames, Vice President-Secretary and house counsel of L&N, and Donald Campbell, L&N's Executive Vice President-Administrator and Account Supervisor for Stokely's advertising. At this time they advised Stokely, for the first time, that L&N had been financially unstable for several years. They further stated that L&N owned its media and production creditors approximately \$10,000,000 and did not have sufficient moneys to pay the entire debt; that L&N had not paid CBS for the television broadcasts which are the subject of this suit.

9. At the meeting on January 13, 1972, Mr. Speirs indicated that L&N had started its downfall in 1965 and had been delinquent with its media creditors almost continually during at least 1970 and 1971. We were advised that in December 1971 these creditors, including CBS, had orally agreed with L&N to a plan for its pay-out of the past due moneys owed by L&N as of October 31, 1971. We were advised that a formal agreement was being drafted to implement these arrangements.

*Affidavit of W. Marcus Newberry*

10. It should be noted that as of January 13, 1972 not one one of the networks, ABC, NBC or CBS, had given any notice to Stokely that it intended to hold Stokely liable in the event of L&N's default in payment. Neither of the networks had communicated in any way with Stokely as of that date concerning any delay in payment for the broadcasts of its commercials. As appears from the depositions of Messrs. Rauchenberger and Werle of CBS and the annexed affidavits of Messrs. Speirs and Ames, representatives of the three networks met with each other and also with representatives of L&N to consider its credit problems. The networks thus knew the problem was serious and widespread but none of them advised Stokely. Finally, in February 1972 each network demanded payment from Stokely of amounts which Stokely had long since paid to L&N in the belief that the amounts paid less the agency commission would be passed on promptly to the networks. It ultimately developed that CBS brought this suit for \$428,497.33; ABC sued for \$385,648.78 (*See American Broadcasting Company, Inc. v. Stokely Van-Camp, Inc.*, S. D. N. Y. 72 Civ. 2036); and NBC demanded, but has not yet sued for, \$165,180.50.

11. I have been informed by Stokely's accounting department that prior to January 13, 1972 Stokely had paid all bills from L&N for the broadcasts which are the subject of this suit. (See exhibit annexed to the Stipulation in this action dated October 31, 1973.) I have also been informed by Stokely's accounting department that in November and December 1971 Stokely made the following payments on various media billings by L&N. (This included payments for approximately \$38,000 for the billings which are the subject of this action and the remainder for other media creditors):

November 5, 1971 .....	\$ 53,018.02
November 23, 1971 .....	\$ 87,706.97
November 29, 1971 .....	\$532,148.22
December 21, 1971 .....	\$308,510.48

(Copies of Stokely's checks to L&N and the statements for which said checks were issued are annexed hereto as Exhibit D.)

12. Upon information and belief, shortly before the meeting with L&N representatives on January 13, 1972, Stokely's income and accounting department had, in the usual course of affairs, prepared a check for \$78,313.11 to the order of L&N, for further

*Affidavit of W. Marcus Newberry*

billings. In view of the knowledge imparted by L&N on January 13, this check was cancelled on January 17, 1972. No further payment was made to L&N and on February 2, 1972 L&N filed a petition under Chapter XI of the Bankruptcy Act. Thereafter, certain payments were made by Stokely to L&N, as debtor in possession. These included the payment of \$1,535.95 for a bill which was included in this suit, referred to at page 29 of CBS's brief, pursuant to an arrangement made as part of the Chapter XI proceedings. This arrangement was based on an order entered in the Bankruptcy Court on February 15, 1972. (A copy of the order of February 15, 1972, and the petition upon which it was based, are annexed as Exhibit E.)

WHEREFORE, I respectfully request that CBS's motion for summary judgment, in all respects, be denied and that Stokely's cross-motion for judgment dismissing the complaint be granted.

W. MARCUS NEWBERRY  
W. Marcus Newberry

Sworn to before me this  
1st day of April, 1974.

GEORGE L. LEWIS  
George L. Lewis, Notary  
My Commission expires February 28th, 1975

## EXHIBIT A

## GENERAL ELECTRIC BROADCASTING COMPANY, INC.

November 30, 1971

Stokely-Van Camp, Inc.  
941 N. Meridian  
Indianapolis, Ind. 46206

Subject: WSIX Nashville  
KOA Denver

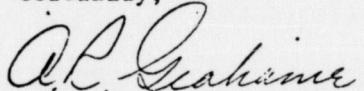
Gentlemen:

We have confirmed acceptance of the attached order to our Representative firm. Also enclosed is a copy of our new Station Contract which became effective September 1971.

The purpose of this letter is to make a general announcement about our terms and conditions as related to payment liability. In this regard, please take particular note of paragraph 4B (2).

We appreciate your business and look forward to serving you in the future.

Cordially,



A. R. Grahame  
Manager-Customer Services

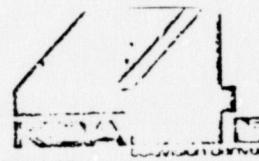
Attachment

1400 BALLTOWN ROAD SCHENECTADY, NEW YORK 12309 518-377-2261

WRGB-TV □ WGTV □ WQFM SCHENECTADY, NEW YORK  
WSIX □ AM • FM • TV NASHVILLE, TENNESSEE      KOA □ AM • FM • TV DENVER, COLORADO

## Exhibit A

No. 29204

1044 LINCOLN ST.  
DENVER, COLORADO 80203

244-4141

DATE 9/23/71 plp

SALESMAN

Dan Mulholland KNY

AGREEMENT BETWEEN KOA-TV CALLED "STATION" AND Lennen &amp; Newell

AGENCY NAME

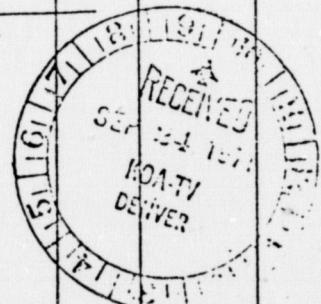
380 Madison Ave. NY, NY  
ADDRESS

CALLED "AGENCY" TO TELECAST OVER KOA-TV ADVERTISING

ADVERTISER: Stuckely van Camp

PRODUCT: Menu Makers

STARTING DATE	10/4	EXPIRATION DATE	1/2/72	NO. OF WEEKS				
NEW ORDER	REVISED	ADDITION TO SCHEDULE	XXX	COMMERCIAL				
RENEWAL	EXTENSION	CANCELLATION		TAPE	LIVE	SLIDE	FILM	CARD #
								71-3
DAY	TIME	FLIGHT	LENGTH	CLASS	SEC	RATE EACH	SPOTS PER WEEK	TOTAL
M-F	1p		30	C	1	65	1	65
M-F	230p		30	C	2	50	1	50
M-F	1030a		30	D	1	30	1	30
Oct. 4 580	Nov. 4 580	Dec. 4 580	Jan. 4 145	4	4	4	4	4
Oct. 4 580	Nov. 5 580	Dec. 5 580	Jan. 5 145	5	5	5	5	5
Oct. 4 580	Nov. 5 580	Dec. 5 580	Jan. 5 145	5	5	5	5	5
Oct. 4 580	Nov. 5 580	Dec. 5 580	Jan. 5 145	5	5	5	5	5



STATION WILL BILL AGENCY MONTHLY AND BROADCAST CHARGES SHALL BE PAYABLE BY AGENCY ON 15TH OF MONTH FOLLOWING THAT OF BROADCAST. GROSS TIME CHARGE AFTER DEDUCTION OF ALLOWABLE DISCOUNTS AND REBATES, IF ANY, WILL BE SUBJECT TO AN AGENCY COMMISSION OF 15%. IF THIS IS WITH A RECOGNIZED ADVERTISING AGENCY, THE CANCELLATION PRIVILEGE ON THE TIME PORTION OF THIS CONTRACT, IT IS UNDERSTOOD THAT THE FILM PROGRAM COVERED BY THIS CONTRACT, WHEN PROVIDED BY THE STATION, IS SOLD ON A NON-CANCELLABLE BASIS, SUBJECT TO CONDITIONS AS PUBLISHED IN SPOT TELEVISION RATES AND DATA AND ANY OTHER CONDITIONS ATTACHED HERETO.

GENERAL ELECTRIC BROADCASTING  
COMPANY OF COLORADO INC.  
TELEVISION STATION KOA-TV

Lennen & Newell  
AGENCY

ACCEPTED BY:

GENERAL SALES MANAGER

ACCEPTED BY:

CONTRACT: STATION COPY

## Exhibit A



BLAIR TELEVISION  
A DIVISION OF JOHN BLAIR & COMPANY

SPOT TELEVISION  
CONFIRMATION

Date October 1, 1971

<p>Marion Jones Lennen &amp; Howell/536 330 Madison Ave New York, NY</p>	Advertiser Stokely Van Camp	Station/Market KCA-TV Denver		
	Product Menu Makers	Salesman/Office D. Mulholland/0112/NY		
	Contract Year	Contract No. <input checked="" type="checkbox"/> 241		
	Cancellation Notice Required	Modification No. <input type="checkbox"/>		
Schedule Dates  <u>10/4/71</u>	Billing Week  <u>M-Sun</u>	Billing Method As Earned <input checked="" type="checkbox"/> Blanket <input type="checkbox"/>	Starting Rate Card  <u>71-2</u>	Future Rate Card  No. <u></u> Effective

## SCHEDULE

Day	TIME		Type	Effective Dates	Class	Sec.	Freq. or Plan	Spots per Week	Earned Rate/Spot	U. N.	Card #
	From	To									
M-F	3:30	5P	30		C	IMP	FL	2	\$40ea		
M-F	10:30	12M	30		EF	II	FL	2	\$90ea		
Sun	8:30P		30		A-6	II	FL	1	\$350		
M-F	1P		30		C	I	FL	1	\$65		
M-F	2:30P		30		C	II	FL	1	\$50		
M-F	10:30A		30		D	I	FL	1	\$30		

IMPACT SPOTS are immediately pre-emptible.

SECTION III spots are pre-emptible on two weeks notice by Section II advertiser.

Times listed represent programming and/or adjacencies as declared at time of sale. AAAA Spot Contract applies except as noted above and/or where variations are set forth in SROS. Rate Protection and Product Protection will follow Policy outlined in Station's Current Rate Card.

ACCEPTED FOR AGENCY, DATE

ACCEPTED FOR STATION, DATE

## EXHIBIT B

December 8, 1971

Mr. Don Campbell  
Lennen & Newell, Inc.  
380 Madison Avenue  
New York, New York 10017

Dear Don:

On November 30, 1971, G. E. Broadcasting, Inc. sent us a certified letter stating that as of September 1971 Agency and Advertiser will be held jointly liable for any media placed with their TV stations. The stations are WSIX, Nashville and KOA, Denver. I've also been informed that WOKI, Atlanta and WTVJ, Miami, among others, also have this liability clause in their station contract.

We at Stokely-Van Camp, Inc. want it on record that we were not aware of the above conditions regarding joint liability and will not under any conditions accept joint liability. In other words, monies now owed various media forms or suppliers are not our responsibility and we hold Lennen & Newell wholly responsible for payment of such.

As per Mark Newberry's request, please furnish us with the following no later than December 15, 1971.

1. A total list of media/supplier liabilities that Lennen & Newell has incurred while the Agency for Stokely-Van Camp but has not yet paid for. These liabilities should be shown through October 1971, as we have not yet paid, or been billed for November bills.
2. This list should include the following information:
  - Name of Station, Network, Magazine, Newspaper, Supplier, etc.
  - Amount owed each of the above media forms and the date of when the first unpaid bill was originally due.
  - This list should also indicate any stations that have joint liability contracts.

I would appreciate your cooperation in this matter as our legal and accounting departments are most anxious to have this information.

If you have questions please don't hesitate to call.

Sincerely,

A. J. Stokely, Jr.

AJS/rw  
cc: W. M. Newberry  
G. I. Lewis  
Jim Keys

## **EXHIBIT C**

ENNEN & NEWELL INC. 1000 18th Street, Suite 1000, Denver, Colorado 80202

December 16, 1971

Mr. Alfred J. Stokely, Jr.  
Stokely-Van Camp, Inc.  
941 North Meridian Street  
Indianapolis, Indiana 46206

Dear Al:

As I mentioned to you over the phone, I didn't receive your letter until December 13. And since we did discuss over the telephone timing on the data you requested, I thought I would take an extra day to be able to talk more precisely to the basic issue of the letter which is obviously of primary concern to you -- the document issued by G. E. Broadcasting. The use of this specific has developed primarily in the area of spot T. V. There have been questions raised by a number of people as to both the practicality and the legality represented. The question of practicality relates to the need for both an advertiser and agency signature on the contract in ultimate execution. One of the major attributes of spot is its flexibility and the speed with which spot buys can be implemented if required. A dual signing could work only negatively against this ramifications.

The general practice in the industry is to affect buys from availals submitted and then confirm upon client approval of scheduling. Confirmation of the final buy is often in the form of a station contract which is validated by the agency but rarely signed. You might say that this is in effect a gentleman's agreement, but it is a practice of many years standing and one that has been accepted.

Last week I spent some time with the general counsel of a major media group who took the position that a stipulation of joint liability, if challenged in the courts, would be proven illegal. He further stated that he hoped he would have the opportunity to represent the defendant if such a challenge developed, for in his opinion, there was no way he could lose the case. This attorney has represented this group and has been involved in contractual matters for them for about twenty years. Obviously, there are many who have great respect for his opinions.

I want to say for the record, Al, that as your advertising agency, we do not accept dual responsibility. Within the practices of the industry as they exist today, we recognize that the sole responsibility for payment to media is ours and we will in no way abrogate this responsibility.

continued ...

## Exhibit C

Mr. Alfred J. Stokely, Jr.

December 16, 1971

- Page 2 -

I believe there are several ways to circumvent this issue. One would be to buy around any stations that have this philosophy, or those who in the future wish to adopt it. I feel this is impractical because it may deny us, and you through us, the use of key stations in important markets at a time when they are needed.

A second way would be for us to give you a letter of indemnification. Just to illustrate the point, let me give you here the hypothetical body of such a letter which would be addressed to the appropriate party at the company and signed by our chief executive officer:

"We hereby agree to indemnify and hold you harmless for all media commitments made by us based on your prior approvals for advertising placed on your behalf for which we have received payments from you covering such commitments."

If you desire such a letter, we would execute it immediately.

A third way would be a different method of payment. I won't detail it in this letter, Al, for it is a lengthy discussion and one that I think deserves more time and probably even a face-to-face exploration.

In summary of this matter, I think it is worthwhile reiterating three points: 1) we do not support the policy of dual liability; 2) if required, the policy can be circumvented; 3) the Agency fully recognizes its responsibilities, which it will fulfill totally.

I'm sure you will be very interested to know that we are paying all invoices currently. We have met with all major creditors and communicated with those not available in terms of geography, or of a less significant nature. Obviously, there will be further conversations with some that we may have inadvertently overlooked or with whom we are communicating in writing. The important thing is that there is a complete mutual cooperation. The key point is that these creditors have agreed that the responsibility to them is totally the Agency's.

We have taken a number of steps to insure the Agency's financial posture -- steps which were, of course, basic to our agreements with our creditors. The two most significant were the sale or partial sale of certain of the Agency's assets and a sharp reduction in operating costs of the Agency. Thus, we are in a position to remain current with our suppliers, meet obligations to all creditors, and, just as importantly, achieve a level of profit at least as good as the average in the industry today.

continued ...

*Exhibit C*

Mr. Alfred J. Stokely, Jr.

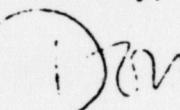
December 16, 1971

- Page 3 -

It hasn't been easy, Al, as I'm sure you can well imagine. But we are over the hump. Our people believe it, our suppliers believe it, and our creditors believe it. The true significance of this is a point I made earlier in this letter which, too, is worth repeating: our creditors accept that responsibility to them is ours alone and is in no way to be shared.

When you have had the opportunity to digest all of this, let's talk further.

Cordially,



Donald G. Campbell.

DGC:pb

## EXHIBIT D

 **Stokely-Van Camp, Inc.**  
 INDIANAPOLIS, INDIANA, 46265 3 3 1 0 5      No. 315577      20-5  
 712

PAY	TO THE	ORDER OF	AMOUNT	DATE	STOKELY-VAN CAMP, INC.
	• Lennen & Newell, Inc.		\$ 53,012.02	11-5-71	
	• 380 Madison Avenue				
	• New York, N. Y. 10017	NOV 10 1971			
THE INDIANA NATIONAL BANK OF INDIANAPOLIS INDIANAPOLIS, INDIANA					

#315577# 1071200056 13017 NOB# 0005301302#

*Exhibit D*

SEND ANY BANK TO  
CHICAGO 10-11-1961

NOV .

ONLY COPY AVAILABLE

## Exhibit D

DATE  
PREP

11-5-71

Stolich-Van Camp, Inc.  
P.O. 523 1112  
11-5-71

ATTACHED IS OUR CHECK IN FULL PAYMENT OF ITEMS LISTED. IF  
NOT CORRECT PLEASE RETURN ADVISING DIFFERENCE.

DESCRIPTION	INVOICE NO. OR DATE	INVOICE NO. OR DATE	INVOICE NO. OR DATE
10-430 - 10.00	10-430 - 10.00	10-437 - 10.75	10-430 - 10.75
340 - 10.72	340 - 10.72	30/0 - 220.25	340 - 10.72
300 - 10.75	10-476 - 10.75.00 cr	10-475 - 97,900.00 cr	
10-470 - 10.75 cr	10-470 - 10.75.00	0043 - 610.00	10-416 - 10.75
6,000 - 21,400.00	00310-10.75.00	10-410 - 614.00	00310-21,400.00
10-313 -	00321 - 10.75.00	10-431 - 1.00	00310-10.75.00

No. 315577

Levison & Hellman, Inc.  
230 Madison Avenue  
New York, N.Y. 10017

DATE 11-5-71

s 53,011.02

150

	REF.	DIV.	INDEX	LOC.	PROD.	AMOUNT	QUANTITY
		01	6557		001	93.50	
		01	6557		001	70.76	
		01	6557		001	140.75	
		01	6557		002	773.13	
		01	6616		001	149.12	
		01	6636		002	955.70	
		01	6714		001	220.25	
		01	7375		004	83.47	
		01	7374		001	371.54	
		01	6367		002	32,000.00 cr	
		01	6367		001	97,900.00 cr	
		01	6714		001	104.18 cr	
		01	7699		001	2906.57	
		01	7699		002	5313.13	
mh				con't			

E525

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## Exhibit D

## CHECK/VOUCHER CONTINUATION SHEET

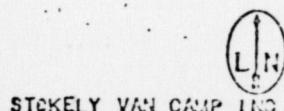
VO.	10	675
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DATE PREPARED	11-3-71
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	REF.	DIV.	INDEX	LOC.	PERIOD.	AMOUNT	QUANTITY
		01	6724		001	6710.95	
		01	6724		001	27.38	
		01	6724		001	24,647.31	
		01	6724		002	10,949.65	
		01	6724		004	644.95	
		01	6724		001	16,232.93	
		01	6727		001	96,913.00	
		01	7270		001	3901.23	
		01	6714		002	1.95	
	01	6714		003		4166.77	

CHECK REGISTER COPY

## Exhibit D



LENNEN & NEWELL, INC. ADVERTISING  
300 MADISON AVENUE, NEW YORK, N.Y. 10017

STOKELY VAN CAMP INC.

PAGE 2

MEDIA	TELEVISION SPOT		DATE	TERMS		BILL NO.	STV-VO-21			
PRODUCT/DIVISION	PORK & BEANS		DESCRIPTION	DATE	NUMBER	RATE	TOTAL	GROSS	DISCOUNT	NET
WBAP	FT WORTH		SEP 71	1.	1.	1,830.00	1,830.00	1,830.00		1,830.00
WBAY	GREEN BAY		SEP 71	1.	1.	400.00	400.00	400.00		400.00
WFRV	GREEN BAY		SEP 71	1.	1.	380.00	380.00	380.00		380.00
WTEN	GREENVILLE		SEP 71	1.	1.	580.00	580.00	580.00		580.00
KHOU	HOUSTON		SEP 71	1.	1.	520.00	520.00	520.00		520.00
KHTV	HOUSTON		SEP 71	1.	1.	730.00	730.00	730.00		730.00
NPBC	HOUSTON		SEP 71	1.	1.	1,990.00	1,990.00	1,990.00		1,990.00
KCMO	KANSAS CITY		SEP 71	1.	1.	1,350.00	1,350.00	1,350.00		1,350.00
KMBC	KANSAS CITY		SEP 71	1.	1.	570.00	570.00	570.00		570.00
WDAF	KANSAS CITY		SEP 71	1.	1.	830.00	830.00	830.00		830.00
KABC	LOS ANGELES		SEP 71	1.	1.	8,600.00	8,600.00	8,600.00		8,600.00
KCOP	LOS ANGELES		SEP 71	1.	1.	2,000.00	2,000.00	2,000.00		2,000.00
KNXT	LOS ANGELES		SEP 71	1.	1.	7,300.00	7,300.00	7,300.00		7,300.00
KNBC	LOS ANGELES		SEP 71	1.	1.	4,100.00	4,100.00	4,100.00		4,100.00
KTTV	LOS ANGELES		SEP 71	1.	1.	3,900.00	3,900.00	3,900.00		3,900.00
WDIX	MIAMI		SEP 71	1.	1.	480.00	480.00	480.00		480.00
WOKT	MIAMI		SEP 71	1.	1.	1,260.00	1,260.00	1,260.00		1,260.00
WTWJ	MIAMI		SEP 71	1.	1.	2,190.00	2,190.00	2,190.00		2,190.00
WISN	MILWAUKEE		SEP 71	1.	1.	400.00	400.00	400.00		400.00

## Exhibit D



LENNEN & NEWELL, INC. ADVERTISING  
380 MADISON AVENUE, NEW YORK, N. Y. 10017

STOKEY VAN CAMP INC

PAGE 3

MEDIA	TELEVISION SPOT	DATE	TERMS	BILL NO.	10-173		
PRODUCT/DIVISION		ORDER/ESTIMATE NO.		STV-VC-21			
DESCRIPTION	DATE	NUMBER	RATE	TOTAL	GROSS	DISCOUNT	NET
WITI	MILWAUKEE	SEP 71	1.	660.00	660.00		660.0
WTMJ	MILWAUKEE	SEP 71	1.	2180.00	2180.00	2180.00	2180.0
KSTP	MINNEAPOLIS	SEP 71	1.	2,154.00	2,154.00	2,154.00	2,154.0
WCCO	MINNEAPOLIS	SEP 71	1.	1,760.00	1,760.00	1,760.00	1,760.0
WSFA	MONTGOMERY	SEP 71	1.	740.00	740.00	740.00	740.0
KOOG	OKLAHOMA CITY	SEP 71	1.	504.00	504.00	504.00	504.0
KWTV	OKLAHOMA CITY	SEP 71	1.	920.00	920.00	920.00	920.0
KKY	OKLAHOMA CITY	SEP 71	1.	500.00	500.00	500.00	500.0
WRAL	RALEIGH	SEP 71	1.	520.00	520.00	520.00	-520.0
WTVD	RALEIGH	SEP 71	1.	800.00	800.00	800.00	800.0
KQD	SAN FRANCISCO	SEP 71	1.	4,700.00	4,700.00	4,700.00	4,700.0
KPIX	SAN FRANCISCO	SEP 71	1.	6,450.00	6,450.00	6,450.00	6,450.0
KRON	SAN FRANCISCO	SEP 71	1.	3,000.00	3,000.00	3,000.00	3,000.0
KTVU	SAN FRANCISCO	SEP 71	1.	1,120.00	1,120.00	1,120.00	1,120.0
KNOX	ST. LOUIS	SEP 71	1.	1,190.00	1,190.00	1,190.00	1,190.0
KPLR	ST. LOUIS	SEP 71	1.	600.00	600.00	600.00	600.00
KSD	ST. LOUIS	SEP 71	1.	2,500.00	2,500.00	2,500.00	2,500.00
WIBW	TOPEKA	SEP 71	1.	270.00	270.00	270.00	270.00

## Exhibit D



Stokely-Van Camp, Inc.

INDIANAPOLIS, INDIANA 46206

No. 201015

20-6  
712

PAY

Lennen & Newell, Inc.  
380 Madison Ave.  
New York, N.Y. 10017

DATE 11/23/71

DEC 2 1971

\$ 87,706.97

TO THE  
ORDER  
OF

MERCHANTS NATIONAL BANK & TRUST CO.  
INDIANAPOLIS, INDIANA

STOKELY-VAN CAMP, INC.

10 20 10 15 10 7 12 000061 08 56 2650

10 0008 770697

*Exhibit D*

ONLY COPY AVAILABLE

## Exhibit D

TO NO. 31	4207	DATE PREPARED 11/22/71
--------------	------	---------------------------

Stokely-Van Camp, Inc.  
P.O. BOX 31173  
INDIANAPOLIS, INDI. 46266

ATTACHED IS OUR CHECK IN FULL PAYMENT OF ITEMS LISTED  
NOT CORRECT PLEASE RETURN ADVISING DIFFERENCES.

DESCRIPTION	INVOICE NO. OR DATE	INVOICE NO. OR DATE	INVOICE NO. OR DATE
	10-174	03349	

No. 201015

Lennen & Newell, Inc.  
300 Madison Ave.  
New York, N.Y. 10017

DATE 11/20/71

\$ 37,705.97

REF.	DIV.	INDEX	LOC.	PROD.	AMOUNT	QUANTITY
vb	01	1514 6714	002 004	002 004	31,925.00 55,700.97	

1325

VOUCHER FILE COPY

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## Exhibit D



LENNEN & NEWELL INC. ADVERTISING  
100 MADISON AVENUE, NEW YORK, N.Y. 10017

STOKEY VAN CAMP INC  
ATTN ACCOUNTS PAYABLE SECTION  
P.O. BOX 11113  
INDIANAPOLIS, INDIANA 46206

Ray 11/13  
G

MEDIA TELEVISION SPOT DATE OCT 25, 1971 TERMS NET 10 DAYS BILL NO. 10-174

PRODUCT/DIVISION FRUITS & VEGETABLES

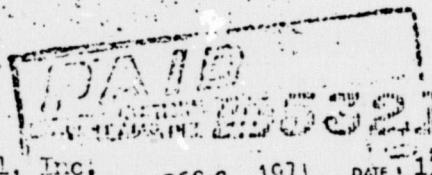
ORDER/ESTIMATE NO.

STV-S-22

DESCRIPTION	DATE	NUMBER	RATE	TOTAL	GROSS	DISCOUNT	NET
ADJUSTMENT BILLING FOR THE MONTH OF SEPTEMBER 1971							
WALB	ALBANY	SEP 11	1.	304.00	304.00		304.00
WLES	ASHEVILLE	SEP 11	1.	270.00	270.00		270.00
WAGA	ATLANTA	SEP 11	1.	760.00	760.00		760.00
WQXI	ATLANTA	SEP 11	1.	350.00	350.00		350.00
WSB	ATLANTA	SEP 11	1.	245.00	245.00		245.00
WAPI	BIRMINGHAM	SEP 11	1.	285.00	285.00		285.00
WBRC	BIRMINGHAM	SEP 11	1.	380.00	380.00		380.00
WCYB	BRISTOL	SEP 11	1.	130.00	130.00		130.00
WCIV	CHARLESTON	SEP 11	1.	125.00	125.00		125.00
WUEN	CHARLESTON	SEP 11	1.	158.00	158.00		158.00
WCHS	CHARLESTON/HUNTINGTON	SEP 11	1.	128.00	128.00		128.00
WSAZ	CHARLESTON-HUNTINGTON	SEP 11	1.	370.00	370.00		370.00
WBTV	CHARLOTTE	SEP 11	1.	380.00	380.00		380.00
WSOC	CHARLOTTE	SEP 11	1.	510.00	510.00		510.00
WBEM	CHICAGO	SEP 11	1.	2029.00	2029.00		2029.00
WLS	CHICAGO	SEP 11	1.	2075.00	2075.00		2075.00

## Exhibit D

 **Stokely-Van Camp, Inc.** No. 201537 20-6  
712  
 INDIANAPOLIS, INDIANA 46206

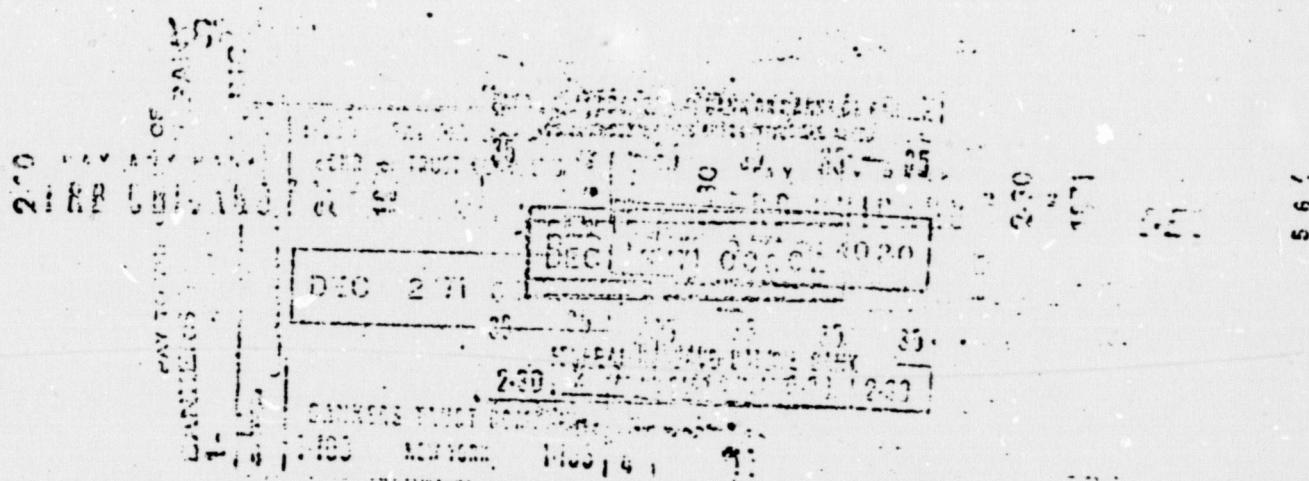
PAY			
TO THE	Lennen & Newell, Inc.	DATE	11-29-71
ORDER	380 Madison Avenue		\$ 532,148.22
OF	New York, N.Y. 10017		

MERCHANTS NATIONAL BANK & TRUST CO.  
 INDIANAPOLIS, INDIANA

STOKELY-VAN CAMP, INC.

"201537" 10712 00061 08 56 2650 "0053214822"

*Exhibit D*



## Exhibit D

VO 11	5551	DATE PREP: 11-29-71
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Stokely-Van Camp, Inc.  
P.O. BOX 1113  
INDIANAPOLIS, IND. 46206

ATTACHED IS OUR CHECK IN FULL PAYMENT OF ITEM LISTED.  
NOT CORRECT PLEASE RETURN ADVISING DIFFERENCES.

DESCRIPTION	INVOICE NO. OR DATE	INVOICE NO. OR DATE	INVOICE NO. OR DATE
03250			
03305			
03306			

No. 201537

Lemon & Newell, Inc.  
300 Madison Avenue  
New York, N.Y. 10017

DATE 11-29-71

\$ 532,140.22

REF.	DIV.	INDEX	LOC.	PROD.	AMOUNT	QUANTITY
	01	6714 6557 6557		001	126,278.22	
	01	6557		002	163,615.00	✓
	01	6557		001	242,255.00	
10/12	01	6687		002		
		6687 01-01-231				

8-328

VOUCHER FILE COPY

*Exhibit D*



LENNEN & NEWELL, INC. ADVERTISING  
389 MADISON AVENUE, NEW YORK, N.Y. 10017

STURDY VAN CARS INC  
551 N. MICHIGAN  
PO BOX 1113  
INDIANAPOLIS IN 46201  
ACCOUNTS PAYABLE SECTION

Ergonomics

A JUSTICE AT COKE

#### 4. CORRECT RATE

**B. PREVIOUS RATE/LINES/SPOTS**

**8. CORRECT DATE/LINES/SPOTS**

7. BIO NOTES

### 3. PREVIOUS RATE

• 848 •

1. 1958

ONLY COPY AVAILABLE

## Exhibit D



LENNEN & NEWELL, INC. ADVERTISING  
380 MADISON AVENUE, NEW YORK, N.Y. 10017

TO: STOKEY VAN CAMP INC  
541 N MCKEELEN  
PO BOX 1111  
INDIANAPOLIS IN 46206  
ACCOUNTS PAYABLE SECTION

MEDIA	PRODUCT	ORD/EST.				DATE	TERMS	BILL NO.	
		TELEVISION	PERK AND BEARS	STV	VU21				
DESCRIPTION	A/C	VENOR NO	DATE	NO DAY	SPOTS LINES	RATE	GROSS	DISCOUNT	NET
KWTV OO ORLANDO CITY SKL	01000	10/71	3			210.00	630.00		630.00
WXY OO ORLANDO CITY SKL	01001	10/71	3			70.00	210.00		210.00
WXY OO ORLANDO CITY SKL	01001	10/71	3			160.00	480.00		480.00
WVAL OO RALEIGH-DURHAM N	01000	10/71	3			50.00	150.00		150.00
WVAL OO RALEIGH-DURHAM N	01000	10/71	3			170.00	510.00		510.00
WTVO OO RALEIGH-DURHAM N	01001	10/71	10			55.00	550.00		550.00
WTVO OO RALEIGH-DURHAM N	01001	10/71	3			100.00	300.00		300.00
WTVO OO RALEIGH-DURHAM N	01001	10/71	3			150.00	450.00		450.00
WTVO OO RALEIGH-DURHAM N	01001	10/71	3			200.00	600.00		600.00
KSGO OO SAN FRANCISCO-CAR	02001	10/71	3			200.00	600.00		600.00
KSGO OO SAN FRANCISCO-CAR	02001	10/71	3			300.00	900.00		900.00
KSGO OO SAN FRANCISCO-CAR	02001	10/71	3			1,000.00	3,000.00		3,000.00
KPIX OO SAN FRANCISCO-CAR	02001	10/71	3			3,225.00	9,675.00		9,675.00
KRON OO SAN FRANCISCO-CAR	02071	10/71	10			175.00	1,750.00		1,750.00
KRON OO SAN FRANCISCO-CAR	02071	10/71	3			500.00	1,500.00		1,500.00
KRON OO SAN FRANCISCO-CAR	02071	10/71	3			550.00	1,650.00		1,650.00
KRON OO SAN FRANCISCO-CAR	02071	10/71	3			500.00	1,500.00		1,500.00
KTVU OO SAN FRANCISCO-CAR	02073	10/71	3			120.00	360.00		360.00
KTVU OO SAN FRANCISCO-CAR	02073	10/71	10			220.00	2,200.00		2,200.00
KPEX OO ST LOUIS MO	02201	10/71	3			50.00	150.00		150.00
KMDA OO ST LOUIS MO	02201	10/71	3			50.00	150.00		150.00
KPLR OO ST LOUIS MO	02201	10/71	3			500.00	1,500.00		1,500.00
KSD OO ST LOUIS MO	02201	10/71	10			75.00	750.00		750.00
KSD OO ST LOUIS MO	02201	10/71	10			175.00	1,750.00		1,750.00
KSD OO ST LOUIS MO	02201	10/71	10			375.00	3,750.00		3,750.00
KSD OO ST LOUIS MO	02201	10/71	10			500.00	5,000.00		5,000.00
KSD OO ST LOUIS MO	02201	10/71	10			750.00	7,500.00		7,500.00
# CULT TORONTO CANADA	02320	10/71	3			5.00	15.00		15.00
# CULT TORONTO CANADA	02320	10/71	3			8.00	24.00		24.00
# CULT TORONTO CANADA	02320	10/71	3			22.00	66.00		66.00
# CULT TORONTO CANADA	02320	10/71	3			24.00	72.00		72.00
# CULT TORONTO CANADA	02320	10/71	10			20.00	200.00		200.00
# CULT TORONTO CANADA	02320	10/71	10			35.00	350.00		350.00
KUTV OO TULSA OKLA	02301	10/71	3			50.00	150.00		150.00
KUTV OO TULSA OKLA	02301	10/71	3			165.00	495.00		495.00
KTUL OO TULSA OKLA	02303	10/71	10			40.00	400.00		400.00
KTUL OO TULSA OKLA	02303	10/71	3			120.00	360.00		360.00
KTUL OO TULSA OKLA	02303	10/71	3			190.00	570.00		570.00
TO CORRECT CALL LETTERS		TOTAL					242,255.00		242,255.00
CULT, TORONTO CANADA									
SHOULD BE									
KTSB TOPEKA KANS									
5 0 8.00, 5 0 5.00, 10 0 28.00, 5 0 35.00, 5 0 22.00									
5 0 24.00									

ADJUSTMENT CODE

1. WE BILL 2. PUB. BILL 3. PREVIOUS RATE 4. CORRECT RATE 5. PREVIOUS RATE/LINES/SPOTS 6. CORRECT RATE/LINES/SPOTS 7. DID NOT RUN

*Exhibit D*



LENNEN & NEWELL, INC. ADVERTISING  
380 MADISON AVENUE, NEW YORK, N.Y. 10017

380 MADISON AVENUE, NEW YORK, N. Y. 10017

STECKLEY VAN CAMP INC  
541 N MICHIGAN  
PO BOX 1115  
INDIANAPOLIS IN 46206  
ACCOUNTS PAYABLE SECTION

115-181

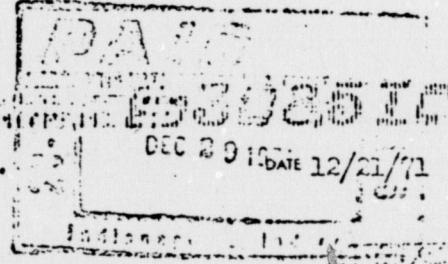
二十一

— 1 —

WE BILL  NO BILL  PREVIOUS RATE  ADJUSTED RATE  CORRECT RATE  PREVIOUS RATE/LINES/SPOTS  CORRECT RATE/LINES/SPOTS  DID NOT RUN

## Exhibit D

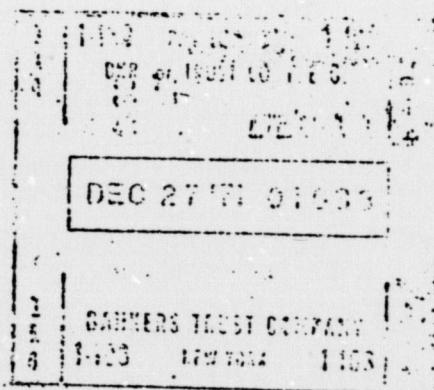
 **Stokely-Van Camp, Inc.** INDIANAPOLIS, INDIANA 46206 No. 203321 20-6  
712

PAY  DEC 29 1971-DATE 12/21/71 \$ 308,510.43  
TO THE ORDER OF • Lennon & Newell, Inc.  
• 300 Madison Ave.  
• New York, NY 10017  
MERCHANTS NATIONAL BANK & TRUST CO.  
INDIANAPOLIS, INDIANA  
STOKELY-VAN CAMP, INC.

#203321# 10712#00061# 08#56 2650# #0030851048#

*Exhibit D*

PAY TO THE ORDER OF  
BANKERS TRUST COMPANY  
1.  
LENIHAN & NEVELL, INC.  
GENERAL ACCOUNT



## Exhibit D

VO NO. 12	12/21/71
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DATE PREPARED	12/21/71
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Stokely-Van Camp, Inc.  
PO BOX 1113  
INDIANAPOLIS, IND 46205

ATTACHED IS OUR CHECK IN FULL PAYMENT OF ITEMS LISTED  
NOT CORRECT PLEASE RETURN ADVISING DIFFERENCES

DESCRIPTION	INVOICE NO OR DATE	INVOICE NO OR DATE	INVOICE NO OR DATE
11-175 03501			
11-181			
03550			
03353			
03332			
11-182			

No. 203321

Zennen & Powell, Inc.  
320 Madison Ave.  
New York, NY 10017

DATE 12/21/71

\$300,510.13

	REF.	DIV.	INDEX	LOC.	PROD.	AMOUNT	QUANTITY
tb		01	6557		001	6395.72	
		01	6557		002	51,571.15	
		01	6714		001	31,573.40	
		01	6723		001	32,297.45	
		01	7899		001	2325.25	
		01	7899		002	1,650.51	
		01	6687		002	123,613.00	
		01	6687		001	96,975.00	

VOUCHER FILE COPY

*Exhibit D*



LENNEN & NEWELL, INC. ADVERTISING  
380 MADISON AVENUE, NEW YORK, N. Y. 10017

100% VIT. C 1000 I.U.  
100% VIT. E  
VIT. A 11,000  
100% CHAMOMILE  
100% PEGASUS

PAGE

12 3123

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**EXHIBIT E****Petition and Order Amending Order of February 10, 1972**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKIn the Matter of  
LENNEN & NEWELL, INC.,

Debtor.

In Proceedings  
for an Ar-  
rangement  
No. 72-B-106

At New York, New York, in said District, on the 15th day of February, 1972.

Upon the annexed petition of the debtor in possession and sufficient cause appearing therefore, upon representation that the Creditors Committee recommended it is

Now, on motion of LEVIN & WEINTRAUB, attorneys for the debtor in possession,

ORDERED, that the debtor in possession be and it hereby is authorized to maintain, in a designated depository of this Court, creditor disbursement trust accounts for the purposes set forth in the annexed petition, and it is further

ORDERED, that the debtor in possession be and it hereby is authorized and directed to deposit into said accounts all moneys received by it from clients, and it is further

ORDERED, that out of the funds deposited in said accounts disbursements shall be made to the debtor in possession on its commissions and on fees related to said funds deposited, and simultaneously disbursements shall be made solely to the media creditors of the debtor in possession and to those other creditors who have supplied materials and/or rendered services to the clients of the debtor in possession for indebtedness incurred by the debtor in possession to said creditors for which the debtor in possession has previously received payment from its clients, and it is further

ORDERED, that in the event of an adjudication in bankruptcy, said funds remaining in the creditor disbursement trust accounts authorized

*Exhibit E*

*Petition and Order Amending Order of February 10, 1972*

hereunder shall continue as trust funds and be paid over to the various creditors entitled thereto without diminution, and it is further

ORDERED, that this order supersedes and amends the previous order of this Court dated February 10, 1972, authorizing media disbursement trust accounts.

/s/ Roy BABITT  
Referee in Bankruptcy

United States of America      } ss.:  
Southern District of New York      }

I, Roy BABITT, Referee in Bankruptcy, in and for the said district, do hereby certify that the within instrument is a true and correct copy of the original as the same appears of record in my office.

In Witness whereof, I thereunto set my hand this 15 day of February, 1972.

ROY BABITT  
Referee in Bankruptcy

By (Illegible)  
Chief Deputy

*Exhibit E***Petition**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKIn the Matter of  
LENNEN & NEWELL, INC.,

Debtor.

TO THE HONORABLE ROY BABITT,  
REFEREE IN BANKRUPTCY:

The petition of the debtor in possession respectfully shows and alleges:

1. That heretofore the debtor filed a petition for an arrangement under Chapter XI, § 322 of the Bankruptcy Act and was thereafter continued in operation and management of its business as a debtor in possession by order of this Court.
2. Petitioner is engaged in the business of an advertising agency.
3. Petitioner's largest creditors consist of various media such as television networks, radio networks, and publishing companies through which petitioner places advertising for its customers.
4. On February 10, 1972, this Court authorized petitioner to maintain various media disbursement trust accounts from which petitioner was to make certain disbursements to various media creditors. Inadvertently petitioner limited the disbursements to media creditors. However, on each job petitioner undertakes for its clients certain other creditors such as, independent contractors, stationery suppliers, artists, etc. must be engaged by petitioner.
5. Petitioner has been requested therefore by its Creditors' Committee to broaden the scope of the previously authorized disbursement trust accounts so as to include all creditors who render services or supplies to petitioner on account of jobs undertaken for petitioner's various clients.

*Exhibit E*

*Petition*

WHEREFORE, petitioner respectfully requests that it be authorized to maintain creditor disbursement trust accounts to make disbursements therefrom in accordance with the annexed order.

Dated: New York, New York  
February 15, 1972

LENNEN & NEWELL, INC.,  
Debtor in Possession

By LEVIN & WEINTRAUB,  
its attorneys

By: .....  
Harris Levin, a Partner

**Affidavit of John D. Speirs**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

COLUMBIA BROADCASTING SYSTEM, INC.,	{	72 Civ. 1687 (IW)
<i>Plaintiff,</i>		
—against—		
STOKELY-VAN CAMP, INC.,	}	Defendant.
<i>Defendant.</i>		

---

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

JOHN D. ("JACK") SPEIRS, being duly sworn, deposes and says:

1. I reside at 350 Stratton Road, New Rochelle, New York.

2. During the period from October 15, 1945 to March 31, 1972 I was Treasurer, Senior Vice President, Executive Vice President Finance of Lennen & Newell, Inc. ("L&N"). As such I was thoroughly familiar with L&N's payment and credit arrangements with the various media from which L&N purchased space and time, including CBS.

3. After a number of profitable years, beginning in 1966, profits declined and turned into losses during 1967-69. L&N's acquisitions of another agency in 1970 proved disastrous and added to its losses. Specifically the agency in question, Geyer Oswald, represented it would deliver \$26,000,000 in billing which was in keeping with audited statements of the prior two years. Unfortunately, personnel defections and client changes resulted in only \$12,000,000 in billing being delivered.

4. Beginning at least in early 1970 and continuing throughout 1971 up until the time L&N filed a petition for Chapter XI relief in February 1972, L&N had difficulty in meeting the payments due to CBS, as well as other creditors. L&N never paid its entire outstanding balance due in any month during this period.

5. CBS's general practice during the years 1970 and 1971 and for many years prior was to bill L&N for network broadcasts

*Affidavit of John D. Speirs*

prior to the end of the month in which they appeared and to demand payment of those bills by the end of the month following the broadcast. CBS's Stations Division also billed regularly following broadcasts. Its representatives indicated over the years that bills for station broadcasts were expected to be paid within 30 days of their receipt by L&N.

6. It was CBS's practice during 1970 and 1971 to start telephoning L&N at about the 20th of the month following each broadcast and billing therefor to inquire as to what amount would be paid on the total outstanding account. CBS agreed some time during this period that an outstanding balance would be permitted to remain each month up to approximately \$500,000; and at such time as the balance exceed \$500,000 CBS would ask for a special meeting to discuss the situation.

7. During 1970 and 1971 many meetings were had between representatives of L&N, including myself, and representatives of CBS, to discuss the status of L&N's payments and L&N's ability to pay. At such meetings, the other representatives of L&N and I would present for discussion our forecast of income, our operating expenses and our present and anticipated profits and losses. During these meetings with Messrs. Louis W. Werle, CBS Network Credit Manager, and Louis J. Rauchenberger, CBS Comptroller, described above, they stated that CBS was continually checking with the other networks with respect to the status of L&N's accounts with them.

8. During 1971, in addition to frequent conversations and meetings with Mr. Werle, alone, there were meetings attended by Mr. Rauchenberger, at least every two months. At these meetings, I specifically informed Mr. Rauchenberger and Mr. Werle that Stokely-Van Camp was current in its payments but that L&N was unable to pay the bills for Stokely broadcasts because the moneys received from Stokely were being used for other pressing media bills. Attached is a list of dates of meetings of this nature which I attended with CBS representatives as well as representatives of the other networks.

9. Although the general practice was that oldest bills got paid first, in about October 1971, CBS representatives, together with other creditors of L&N, agreed that L&N could defer payment of all moneys due as of October 31, on condition that L&N

*Affidavit of John D. Speirs*

would keep payments for further sales, after that date, on a current basis.

10. At no time during the meetings with CBS did I ever tell CBS that Stokely-Van Camp knew that L&N had not paid CBS for the Stokely broadcasts or that L&N had been utilizing the moneys paid by it for such broadcasts for other purposes. I may have told CBS representatives some time in late December 1971 that Lorillard Co. had been informed that CBS bills for its advertisements were outstanding.

11. At no time prior to January 13, 1972 was Stokely-Van Camp informed that L&N had not paid CBS for Stokely advertisements for which it had received moneys from Stokely or that L&N had utilized the moneys received from Stokely for other expenditures. On that date, in company with Don Campbell and J. Lewis Ames, Executive Vice President and Vice President-Secretary of L&N, respectively, I went to Stokely's home offices in Indianapolis. We met with Stokely representatives and informed them for the first time that the moneys paid by Stokely for CBS broadcasts had been utilized by L&N for pressing media bills other than the CBS bills.

12. During the fall of 1971 we made extensive efforts to cut expenses and persuade our creditors to extend our time for payment. Our hope of recovery rested on keeping our major advertisers, such as Stokely; and if possible attracting new business. Because we did not want advertisers to leave and we felt our problems with the creditors, including CBS, could be solved, we did not inform Stokely and our other clients of our difficulties until later, as described above.

13. In late November, 1971 a Creditors Committee of L&N was formed, which included representatives of CBS as well as other networks and other creditors. A series of plans were submitted to the Committee to provide for reduction of L&N's outstanding past due debt over the following year. The creditors of that Committee, including CBS, approved the first plan, which called for a one-year period of time to pay up the back debt (i.e., as of October 31, 1971) with all future billings to be paid on a current basis. However, prior to any formalization of this agreement, in January 1972 one of L&N's advertisers, Florida Citrus Commission, withdrew its business. Other advertisers appeared to

*Affidavit of John D. Speirs*

follow. When L&N submitted a new plan on or about January 19, 1972 calling for payment of 50¢ on the dollar, the networks, including CBS, withdrew from the Committee. Thereafter, L&N filed a petition for relief under Chapter XI on February 2, 1972.

JOHN D. SPEIRS  
John D. Speirs JOSEPH JOHN TERRASI

Sworn to before me this  
1 day of April, 1974.

62a

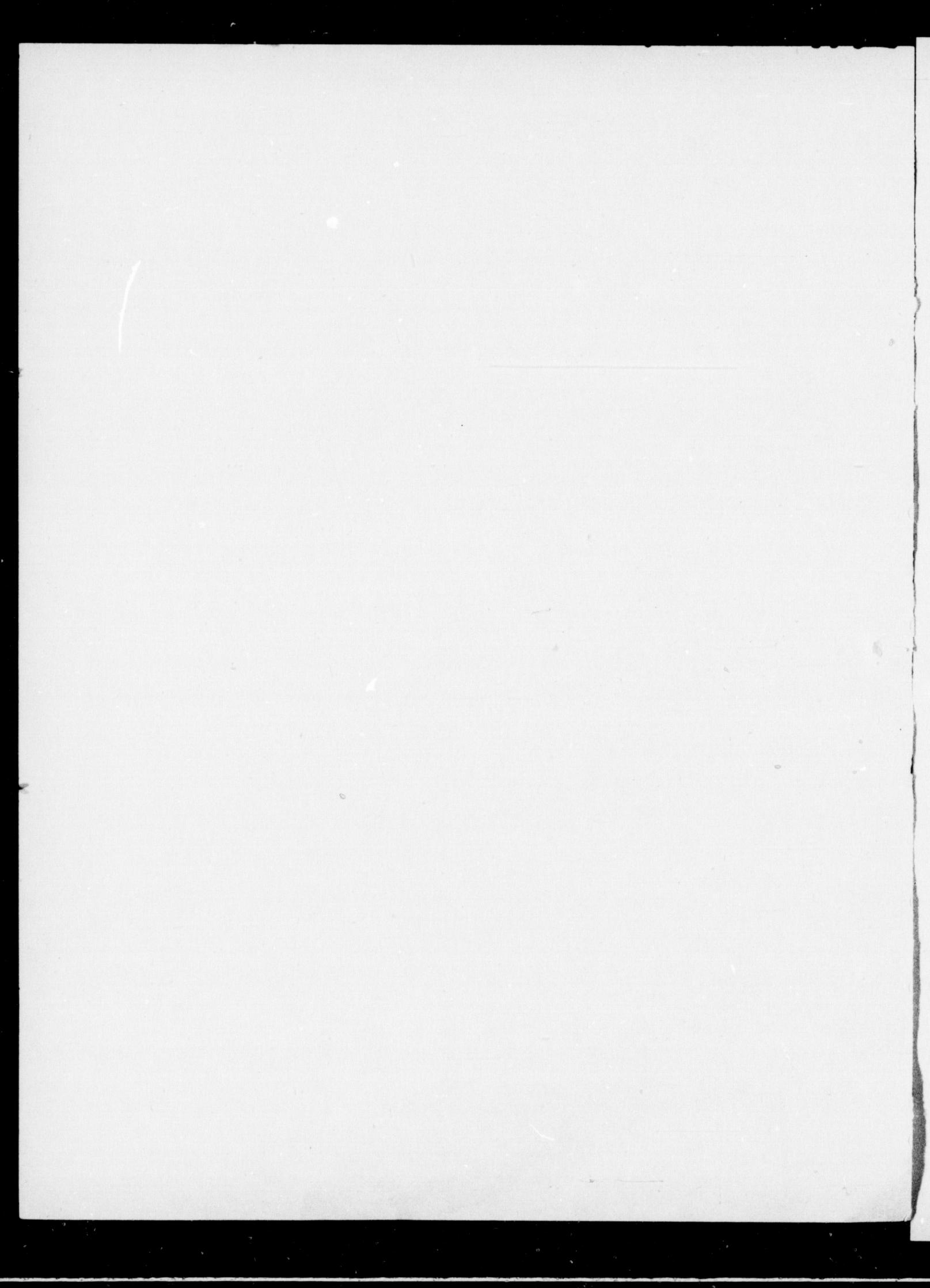
JOSEPH JOHN TERRASI  
Notary Public, State of New York  
No. 24-9305200  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires March 30, 1976

*Affidavit of John D. Speirs***1970**

- 3/4 Rauchenberger, Werle CBS
- 3/18 Raburn NBC
- 5/15 Rauchenberger, Werle CBS
- 6/15 Raburn
- 6/25 Rauchenberger, Werle CBS
- 7/8 Rauchenberger, Werle CBS
- 9/1 Raburn NBC
- 12/17 Murray ABC

**1971**

- 1/27 Rauchenberger, Werle, Bache CBS
- 2/1 Werle, CBS—Ames
- 2/8 Raburn NBC
- 2/9 Murray ABC—Muller
- 3/24 Raburn NBC
- 6/17 Raburn NBC
- 8/2 Raburn NBC
- 8/3 Werle CBS
- 9/3 Raburn NBC
- 9/7 Werle CBS
- 9/9 Murray ABC
- 10/4 Raburn NBC
- 11/7 Murray ABC
- 12/6 Rauchenberger, Werle CBS
- 12/20 Raburn NBC



**Affidavit of J. Lewis Ames**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
Plaintiff,  
—against—  
STOKEY-VAN CAMP, INC.,  
Defendant.

72 Civ. 1687  
(IW)

STATE OF NEW YORK } ss.:  
COUNTY OF NEW YORK }

J. LEWIS AMES, being duly sworn, deposes and says:

1. I reside at 129 Rumson Road, Massapequa, New York 11758. I am an attorney at law admitted to practice in the States of New York and Virginia.
2. During the period from January 1969 to June 1972 I was Vice President—Secretary and house counsel of Lennen and Newell, Inc. ("L&N"). As such, I became familiar with some of the dealings between L&N and its creditors, including Columbia Broadcasting System, Inc. ("CBS"). I was previously employed at CBS Television Network, Inc. from 1959 to 1961, in its Business Affairs Department as Manager of Syndication and Program Development Costs.
3. I attended meetings between CBS and other networks and L&N personnel and representatives during the summer and fall of 1971, at which discussion was had regarding the financial condition of L&N and the status of its account with CBS. The persons who attended these meetings for L&N, in addition to myself were John D. Speirs and sometimes Gilbert J. Muller (V. P. and Controller). CBS Television Network, Inc. was usually represented by Louis W. Werle, its Network Account Receivables Manager, and Mr. Louis J. Rauchenberger, its Controller. At some meetings, a representative of the CBS legal staff was also present. I also attended certain meetings held by the Creditors Committee

*Affidavit of J. Lewis Ames*

formed in the latter part of 1971 which were also attended by representatives of CBS and the other networks. Annexed is a list of meetings I attended in this period.

4. At the meetings in the summer and fall of 1971, prior to the formation of a formal creditors committee, CBS was advised generally of L&N's financial situation and the problems L&N had been experiencing for several years. During such period of time, Mr. Speirs briefed CBS on the general projection figures as to L&N's earnings, expenses, debts, anticipated earnings, if any, as well as information on contemplated cutbacks of personnel, internal expenses and general information on efforts being made in the merger area. L&N had not earned any profits since 1966 and had incurred losses, according to Mr. Speirs' figures, of approximately \$600,000 in each of 1967 and 1968. Furthermore, according to information received from either Mr. Speirs or Mr. Muller, L&N had not given an audited financial report to any network creditor for three years nor, to the best of my knowledge, had one been requested, although such was the general custom in the industry. CBS was also informed at this time, particularly at the meeting held on September 2, 1971, that the merger of Geyer-Oswald with L&N in early 1971 had resulted in substantial losses and additional costs to L&N. It was at this meeting that a method of direct payments by Advertisers to the networks was discussed and Mr. Rauchenberger stated to Mr. Speirs and myself that the networks were considering such a method and that the financial officers of the various networks and divisions thereof were constantly checking with each other on delinquent or past due accounts. A discussion of dual liability of Agency and Advertiser also took place. During such discussion, I specifically recall telling the CBS representatives that, in my opinion, it would be hard to sustain dual liability as to an Advertiser since none of the networks had taken any steps whatsoever to keep Advertisers advised of the status of payments being made by the Agency on their behalf.

5. By the summer of 1971, L&N's financial picture was critical. In an effort at recovery, L&N's payroll and other expenses were sharply reduced and CBS was so advised by Mr. Speirs.

6. CBS was also advised that L&N had taken monies as received from its clients, including Stokely, for the payment of

*Affidavit of J. Lewis Ames*

pressing media bills, regardless of the client involved, and other expenses as well, attempting wherever possible to decrease the total "past due" obligations, since all of the networks had made the point that during a period of a year L&N's "past due" had gone from 40 to 50 days to over 90 days.

7. Toward the end of 1971, a Creditors Committee was formed. The three networks, including CBS, participated in this Committee and at one point agreed to allow L&N to defer payment of all monies due as of November 1, 1971 and pay that debt gradually over a period of a year. This was to enable L&N to continue to do business, which it was agreed would be kept on a "current" basis.

8. Subsequent to the filing of the Chapter 11 Petition on February 2, 1972 L&N stated at a creditors meeting that it could only pay \$.50 on a dollar. At this point, the network creditors withdrew.

9. At no time did I inform anyone at CBS that Stokely-Van Camp or any other clients knew either the extent of L&N's financial problems or that L&N had been using monies paid to them by their clients for payment of other media bills and as well as to pay pressing bills regardless of what clients were involved. The past due records at such time should have clearly indicated to network representatives our problems. Some L&N clients were informed of L&N's financial problems in late December 1971, after the formation of the Creditors Committee. These discussions as I recall were limited to Lorillard and National Distillers, although the networks had known that for a number of months Florida Citrus Commission was paying its bills directly to media.

10. No discussion of the matter was had with Stokely-Van Camp until representatives of L&N, including myself, went to Indianapolis on January 12, 1972, and the following day met with Stokely-Van Camp representatives. At that time Mr. Speirs advised them for the first time that L&N had severe problems and had not paid CBS and others for Stokely advertisements, but had used the monies paid to it by Stokely for other expenses. At that meeting Stokely was first advised of potential claims based on the theory of "dual liability" of Agency and Advertiser.

*Affidavit of J. Lewis Ames*

11. The practice in the industry to my knowledge always has been for the networks to look solely to the agencies for payment of their bills.

J. LEWIS AMES  
J. Lewis Ames

Sworn to before me this  
1 day of April, 1974.

JOSEPH JOHN TERRASI

JOSEPH JOHN TERRASI  
Notary Public, State of New York  
No. 24-9305200  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires March 30, 1976

**MEETINGS**

Aug. 18, 1971      Lunch meeting with Lou Werle of CBS at Stockyards.

Aug. 19              Lunch meeting with John Murray of ABC at Cattlemen West (Taft Hotel).

Sept. 2              Lunch meeting with Werle and Rauchenberger of CBS and Jack Speirs at Mercurios West 53rd Street.

Dec. 10              Meeting at Lennen & Newell in Speirs office with Murray of ABC, Werle of CBS and Rayburn of NBC.

Dec. 27              Creditors Committee meeting at Lennen & Newell attended by same network representatives.

Jan. 6, 1972          Creditors Committee meeting at Lennen & Newell likewise attended by Murray, Werle and Rayburn.

Jan. 19              Creditors Committee meeting at Lennen & Newell.

Jan. 25              Creditors Committee meeting at Lennen & Newell.

**Opinion of Wyatt, J.**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKCOLUMBIA BROADCASTING SYSTEM, INC.,  
*Plaintiff,**—against—*STOKELY-VAN CAMP, INC.,  
*Defendant.*

72 Civ. 1687

**APPEARANCES**

CRAVATH, SWAINE & MOORE, ESQS.  
*Attorneys for Plaintiff,*  
One Chase Manhattan Plaza  
New York, New York 10005

HAROLD R. MEDINA, JR., ESQ.  
RICHARD M. HIRSCH, ESQ.  
*Of Counsel*

LORD, DAY & LORD, ESQS.  
*Attorneys for Defendant*  
25 Broadway  
New York, New York 10004

JOHN J. LOFLIN, ESQ.  
MURIEL BELL  
*Of Counsel*

WYATT, District Judge,

This is a motion by plaintiff (CBS) for summary judgment for \$428,497.33. Fed. R. Civ. P. 56.

There is also a motion by defendant (Stokely) for summary judgment in its favor dismissing the complaint.

CBS owns and operates five television stations and also operates a television network, which transmits television programs and adver-



*Opinion of Wyatt, J.*

tising commercials to its five stations and to some 130 network affiliated stations, these last being independently owned and operated. CBS is a New York corporation, with its principal place of business here.

Stokely is a maker of various products (apparently food products) which it has advertised extensively for many years. Stokely is an Indiana corporation, with its principal place of business there.

Lennen & Newell, Inc. (Lennen) was at all relevant times a corporation (presumably organized under New York law) engaged as an advertising agency in New York. Before the events in suit, Lennen had been for many years employed by Stokely as its advertising agency. The "arrangement" between Stokely and Lennen was "unwritten" (stipulation dated October 31, 1973, para. 6).

Lennen dealt with CBS on behalf of Stokely which had no direct contact with CBS. The invoices of CBS for its services were sent to Lennen which sent its own invoices to Stokely, usually *before* receipt of the invoices from CBS. Stokely promptly paid Lennen for all the CBS invoices but Lennen failed to pay CBS for invoices aggregating the amount here in suit.

Lennen filed a petition in bankruptcy in this Court on February 2, 1972 for an arrangement under Chapter XI.

This action was commenced on April 25, 1972. There is one claim based on fifteen separate advertising contracts said to have been entered into by defendant Stokely, acting through its agent, Lennen. CBS avers that it performed under the contracts and that the contract price, \$428,497.33, is due and payable. Diversity jurisdiction is asserted (23 U. S. C. § 1332(a)) and appears to exist.

Stokely has answered and pleads two affirmative defenses. The first is that it has paid Lennen on plaintiff's behalf all of the sums said to be due. The second is that CBS knew that Stokely was paying Lennen, that Lennen was not paying CBS, that Stokely was unaware of this failure by Lennen, that CBS failed to notify Stokely of Lennen's defaults in payment, and that CBS (unknown to Stokely) modified and extended the contract obligations of Lennen to CBS.

There is no genuine issue as to any material fact.

The issue is simply whether CBS or Stokely bears the loss caused by Lennen's default.

*Opinion of Wyatt, J.*

1.

There are two alleged network contracts relied on by CBS.

The first to be considered (whether or not the first in point of time) was initiated by Lennen by "verbal order" confirmed by letter of Lennen to CBS, dated May 4, 1971, stating that Lennen was purchasing "in behalf of" Stokely (Ex. B). CBS then sent to Lennen a "Network Television Agreement" (dated April 9, 1971, Ex. C) with a covering letter dated May 25, 1971. The CBS "order number" for this agreement was 71-523. The proposed form of agreement as sent was unsigned by CBS; the covering letter asked that, if the agreement was "in order", Lennen should sign it and return it to CBS "for counter-signature" after which "a fully-signed copy" would be returned to Lennen. The proposed agreement was between CBS and Lennen (called Agency in the agreement) "acting as agent for" Stokely; it was provided that Agency would pay CBS the "gross sum" of \$176,000 "in monthly installments on or before the last day of each month of the term hereof in accordance with billing received from CBS". The proposed agreement also stated that if it was made with "a recognized advertising agency" then "each payment was subject to the deduction therefrom of an advertising agency commission" of 15%. The proposed agreement was to be signed by Lennen "as agent for" Stokely. One of the printed provisions recites that "Agency is acting as agent for disclosed principal".

The proposed agreement was never signed by Lennen or by CBS. The parties apparently ignored the question of execution of the agreement.

CBS performed the services called for in the agreement and sent invoices to Lennen; Stokely was shown on the invoice as "advertiser". There was a "gross billing" amount, an "agency commission" and a "net invoice" amount. Presumably payment was due from Lennen to CBS on or before the last day of the month in which CBS rendered its billing. Lennen sent a bill to Stokely for the gross billing of CBS, retaining the agency commission for itself. Generally, if not always, Lennen sent its bills to Stokely *before* it had received any bill from CBS. Stokely paid Lennen promptly for all bills rendered; Stokely specifically paid for all bills rendered by Lennen in respect of CBS advertising.

Under the 71-523 network agreement CBS sent to Lennen the invoices shown below, all dates being in 1971. Lennen, before or after

*Opinion of Wyatt, J.*

receipt of these invoices from CBS, had sent bills to Stokely for the gross billing amount and Stokely paid to Lennen these amounts promptly. Where no date of payment by Stokely is shown, there is no record of the date but the payment was made by Stokely.

<u>CBS Invoice Date</u>	<u>Gross Billing</u>	<u>Net Invoice</u>	<u>Date Stokely Paid Lennen</u>
June 29	\$22,468	\$ 19,098	July 13
August 2	75,600	64,260	August 6
August 2	2,206	1,875	
September 2	80,966	68,821	September 7
		<u>\$154,054</u>	

**2.**

The second alleged network contract on which CBS relies was handled in the same way as the first. CBS sent to Lennen a "Network Television Agreement" dated April 12, 1971, with a covering letter dated April 20, 1971. The CBS "order number" for this agreement was 71-528. The agreement was never signed by CBS or by Lennen. CBS performed the services required and sent invoices to Lennen as shown below, all dates being in 1971. Lennen, before or after receipt of these invoices from CBS, had sent bills to Stokely for the gross billing amount and Stokely paid these amounts to Lennen promptly. Where no date of payment by Stokely is shown, there is no record of the date but the payment was made by Stokely.

<u>CBS Invoice Date</u>	<u>Gross Billing</u>	<u>Net Invoice</u>	<u>Date Stokely Paid Lennen</u>
June 29	\$61,050	\$ 51,892	July 13
August 2	42,500	36,125	August 6
July 1	1,176	1,000	
August 2	882	750	
September 2	24,050	20,442	September 7
		<u>\$110,209</u>	

**3.**

The amount owned on the first network contract is equal to the sum of the net invoices under that contract, namely, \$154,054.

The amount owed on the second network contract is equal to the sum of the net invoices under that contract, namely \$110,209.

*Opinion of Wyatt, J.*

The total amount owed on the two network contracts is thus \$264,263. According to CBS, the amount is \$261,684 (for example, CBS memo. p. 1). Why there should be this small difference is not made to appear. It may be an arithmetical error by CBS, or credit due to Lennen but not reflected in the papers, or some other reason. The difference is of no importance on this motion.

**4.**

There are also thirteen alleged station contracts relied on by CBS. The station contracts are with respect to available time spots during the telecasting of programs broadcast by television stations owned and operated by CBS in Philadelphia, Chicago, St. Louis and Los Angeles.

These contracts are all in writing and are signed by CBS and Lennen with the exception of one contract, a signed original of which cannot be located. The twelve signed contracts are set forth as Exhibits K, M, O, Q, S, U, W, Y, AA, CC, EE, and GG. A copy of the other contract is Exhibit I.

Each station contract follows what appears to be a standard form contract used by CBS and is styled "Television Stations National Sales Schedule Agreement".

Each contract states that it is between CBS and Lennen "acting as agent for" Stokely.

The contracts set forth the total package cost of the "announcements" to be covered and states that it is "subject to a 15% advertising agency commission unless otherwise specifically provided for in this agreement". (15% of gross billing was standard advertising agency commission at the times in question.)

A printed form attached to each contract states the terms and conditions as defined by CBS. Under the heading "6. Payment" appears a subheading "A. Time of Billing and Payment" and then the following clause:

"CBS shall bill Advertiser via Agency monthly or weekly whenever CBS shall so elect, for the charges due hereunder for such period. Advertiser shall pay CBS, in accordance with such billing, within ten calendar days after receipt thereof. Any failure whatsoever by Advertiser to make timely payment charges under this Agreement or any other breach whatsoever by Advertiser or Agency of this agreement shall give CBS the right in addition to its other rights, to cease performance of this Agreement."

*Opinion of Wyatt, J.*

The thirteen station contracts were executed during the period December 10, 1970 to September 20, 1971 (Exhibits: I—December 10, 1970, K—December 10, 1970, M—December 16, 1970, O—January 7, 1971, Q—February 11, 1971, S—April 7, 1971, U—April 14, 1971, W—May 28, 1971, Y—May 28, 1971, AA—May 31, 1971, CC—August 30, 1971, EE—September 13, 1971, GG—September 20, 1971).

CBS performed the services called for in the station contracts. After its performance of each contract, CBS sent invoices to Lennen, Stokely was shown on the invoices as the "advertiser". There were in each invoice amounts for "net before agency commission", "agency commission", "net facilities", "additional charges" and "net invoice". These invoices were sent to Lennen regularly following the broadcast of the "announcements". Invoices for station broadcasts were expected by CBS to be paid within 30 days of their receipt by Lennen, according to indications to Lennen by representatives of CBS (see affidavit (para. 5) of Jack Speirs, officer of Lennen, an exhibit to cross-motion). The invoices of CBS were never sent to Stokely.

Lennen sent its own invoices to Stokely; it is undisputed that Stokely paid Lennen for all invoices of Lennen under the station contracts with CBS.

Under the station contracts, CBS sent to Lennen directly the invoices shown hereafter. Lennen, either before or after the receipt of these invoices from CBS, sent its own invoices to Stokely for amounts corresponding to "net before agency commission" (similar to the "gross billing" amounts used in network contracts).

These CBS invoices under the station contracts are set forth in the primary documents as the following exhibits: J, L, N, P, R, T, V, X, Z, BB, DD, FF, and HH. In some instances, there may be more than one invoice under a single contract, this is because some of the contracts covered "announcements" to be made over several weeks and invoices were sent to the agency before a contract was fully performed. In some instances the "net before agency commission" as stated in the invoices does not correspond to the "total package cost" as stated in the contract. This is probably because the number of "announcements" called for in the contract were not actually made during the period of the contract.

*Opinion of Wyatt, J.*

The invoices under the station contracts were as follows:

CBS Invoice Date	Exhibit	Net before agency commission	Net Invoice	Date Stokely paid Lennen	Exhibit Contract
2/ 5/71	P	\$12,000	\$ 10,200.00	2/11/71	O
2/ 5/71	J	3,210	2,728.50	3/ 5/71	I
2/ 5/71	N	2,835	2,409.75	3/ 5/71	M
2/28/71	P	14,400	12,240.00	3/ 9/71	O
2/28/71	R	1,625	1,381.24	4/ 5/71	Q
3/12/71	L	4,000	3,400.00	3/ 5/71	R
4/ 3/71	P	16,000	13,680.00	4/ 2/71	O
4/ 3/71	R	1,425	1,211.24	4/ 2/71	Q
4/30/71	P	17,000	14,960.00	5/ 3/71	O
4/30/71	T	5,000	4,250.00	5/ 6/71	S
4/30/71	V	11,936	10,145.60	5/ 6/71	U
5/30/71	T	10,000	8,500.00	6/ 8/71	S
5/30/71	V	23,872	20,291.20	6/ 8/71	U
6/30/71	X	5,580	4,743.00	6/10/71	W
6/30/71	Z	5,000	4,250.00	6/30/71	Y
8/25/71	E	400	340.00	6/30/71	Y
9/30/71	DD	11,850	10,072.50	11/ 5/71	CC
9/30/71	FF	1,550	1,317.50	11/ 5/71	EE
9/30/71	HH	3,951	3,358.35	11/23/71	GG
10/31/71	DD	15,000	13,430.00	11/29/71	CC
10/31/71	FF	3,245	2,758.25	11/29/71	EE
10/31/71	HH	8,223	6,989.55	11/29/71	GG
11/16/71	BB	14,720	12,512.00	6/10/71	AA
(revised 6/71 invoice)					
11/30/71	HH	8,231	188.70	12/21/71	GG
12/31/71	HH	1,807	1,535.95	2/17/72	GG
			\$166,813.33		

CBS has not been paid for these invoices, which aggregate \$166,813.33. (The November 30, 1971 invoice cannot be understood but the parties are apparently agreed that \$188.78 is the amount due to CBS on this invoice.)

## 5.

The total of the invoices under the two network contracts, \$261,684 (according to CBS), and the total of the invoices under the thirteen

*Opinion of Wyatt, J.*

station contracts, \$166,813.33, is the \$428,497.33 for which the action is brought. There is no doubt that CBS is owed this sum. The issue is whether Stokely, having already paid this sum to Lennen, is liable to CBS.

**6.**

Lennen was the advertising agency used by Stokely for some 17 years, ending March 23, 1972. There was no written agreement between them.

Lennen and CBS were in New York. Stokely was in Indianapolis. CBS dealt with Lennen about many advertisers, of which Stokely was only one.

Lennen gave Stokely advertising advice and Stokely independently decided how much it would spend on TV advertising in each year. Within this amount, Lennen decided what stations, times and programs should be used and Lennen made the arrangements (contracts or otherwise) for the television advertising. Stokely did not know what contracts, if any, had been made. The responsibility was solely that of Lennen. Stokely knew that Lennen was being paid through a commission based on the gross amount of the invoices but the payments to CBS were made solely by Lennen. Stokely paid after receipt of invoices from Lennen of the gross amount (that is, including commission) and its payments were solely to Lennen. Lennen did not pay CBS first and then invoice Stokely. As indicated earlier, Lennen usually, if not always, invoiced and collected from Stokely and simply added the receipts from Stokely to its general funds. Thereafter it paid CBS if and when it alone determined. In respect of Stokely advertising invoiced to Lennen, nothing was paid to CBS by Lennen after July 30, 1971 and at that point there were many invoices to Lennen which had been past due from at least as early as March 5, 1971.

The network contracts provide for payment to CBS by Lennen (the Agency) in monthly installments on or before the last day of each month of the term hereof in accordance with billing received from CBS. This seems to mean that payment is due from Lennen at the end of each month for all broadcasts for which Lennen had received bills in that month. The network invoices stated: "Terms Payment due on last day of the month in which broadcast is scheduled".

The station contracts provide that payment was due to CBS within "ten calendar days" after receipt of the "billing". The station invoices, however, carried a statement: "Terms—Net Cash upon receipt of invoice".

*Opinion of Wyatt, J.*

In practice, CBS paid no attention to the provisions for payment, whether consistent, comprehensible or otherwise. Apparently, the hope and expectation of CBS was that Lennen would pay its bills within 30 days of their receipt.

The invoices from Lennen to Stokely were not copies of the CBS invoices and did not refer to the CBS invoices. The Lennen invoices were on a Lennen invoice form and did not show any agency commission. They showed a "gross", "sales tax", "cash discount" and "net". They did not purport to reflect the credit terms in the CBS contracts. They uniformly stated: "Terms Net 10 days" and Stokely seems uniformly to have met these terms.

It is clearly established that Lennen had no actual authority to contract with CBS on behalf of Stokely. In this connection, it is noted that Stokely received a letter dated November 30, 1971 from a broadcasting station, not connected with CBS, advising that "Agency and Advertiser" would be held jointly liable for television advertising. Stokely promptly wrote Lennen that it would "not under any conditions accept joint liability" and that Lennen was "wholly responsible for payment". Lennen wrote in reply to Stokely under date of December 16, 1971. The reply stated flatly that Lennen had "the sole responsibility for payment to media" (such as CBS) and that this was in accord with "the practices of the industry".

Lennen had losses in 1967, 1968, and 1969 and an acquisition in 1970 was "disastrous and added to its losses" (Speirs affidavit, p. 1).

From not later than some point in 1970, CBS knew that Lennen was in financial difficulty, was being paid by Stokely for its television advertising but was not using such payments to discharge its obligation to CBS, and was behind in settling invoices of CBS. It is difficult to find at just what time in 1970 CBS learned this but CBS knew from at least August or September 1970 (for example, Werle deposition SM 8, 9). According to an affidavit of a Lennen officer, not contradicted so far as I can find by counter proof from CBS, from "early 1970" until February 1972, Lennen "never paid [to CBS] its entire outstanding balance due in any month during this period (Speirs affidavit, p. 2).

The record shows that the position of CBS was determined by the fact that Lennen was one of the largest agencies and over many years had given CBS major business from many clients. CBS wanted to keep the good will of Lennen and to keep Lennen in business. Had the situation been disclosed to the advertisers, such as Stokely, these

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would likely begin paying their bills directly to the media or leave Lennen. As with other agencies which had pulled through financial trouble, CBS, as one of its officers put it, "went along with the agency and extended a little more time" (Werle deposition, SM 37).

It is doubtless true that CBS felt that notifying the advertisers would jeopardize Lennen's chance to survive, but this feeling was based on the interest of CBS in the survival of the agency and not on the interests of the advertisers themselves.

CBS therefore did not advise Stokely of the financial trouble of Lennen, never claimed that Stokely was liable to CBS, and never communicated with Stokely until after Lennen had filed a petition in bankruptcy.

Florida Citrus Commission was a client of Lennen. The Commission like Stokely paid Lennen for CBS advertising but Lennen did not pay CBS when due. CBS pressed Lennen on the point. The Commission asked Lennen if CBS would give up the "right of recourse" against the Commission for advertising. This inquiry was relayed to CBS. Under date of March 15, 1971, CBS declined to do so. The Commission then asked CBS to send it directly the relevant invoices. CBS did so and the Commission paid these directly to CBS. No one advised Stokely of this incident.

As 1971 wore on, the situation of Lennen grew worse. CBS and other creditors agreed that payments due on or before October 31, 1971 could be deferred on condition that payments due after that date would be "on a current basis" (Speirs affidavit, p. 3). CBS did not advise Stokely that it was thus modifying its credit terms to Lennen.

In 1970 and 1971, there were many discussions between CBS and Lennen about the financial condition of the latter and the payments due. In these meetings, it seems to have been assumed by CBS that Lennen—not Stokely—was the debtor. By November 17, 1971, CBS had set up a reserve for loss on the Lennen account (Ex. 00) and was discussing with Lennen an arrangement for direct payment to CBS in the future by the advertisers and a 2-3 year pay out [by Lennen] on past due items (Ex. 00).

By November 1971, CBS realized that the survival of Lennen was in doubt and that bankruptcy was a possibility.

Beginning November 23, 1971, there were a number of meetings of creditors of Lennen (attended by CBS) and a Committee of Creditors (of which CBS was a member) was constituted.

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By December 13, it appeared that it would take three years for Lennen to retire its "past due position" (Ex. 00).

In January 1972, CBS lawyers were called in and a legal position was then suggested that "CBS retains the right to recapture amounts billed directly from the advertisers, since the agency functions merely as a conduit of media fees", it was believed that this legal position would be compromised if a note arrangement were made with Lennen "since the advertisers might then construe such a move as relieving them of their contractual liability to the media" (Ex. 00).

By January 25, 1972, it appeared that bankruptcy was inevitable.

After a meeting of the committee of Creditors on January 27, at which a plan for an arrangement under Chapter XI was considered, CBS (and two other creditors) withdrew "from any further committee affiliation" because "further identification with the committee might be construed as an endorsement of the proposed plan, and might therefore prejudice their legal rights against the advertisers". (Ex 00)

Meanwhile Stokely, not knowing the state of affairs at Lennen and specifically not knowing that for Stokely telecasts Lennen had paid nothing to CBS after July 30, 1971, continued to pay Lennen invoices to Lennen, not only for CBS telecasts but also for other advertising placed by Lennen.

After July 30, 1971, Stokely made payments to Lennen for CBS telecasts as follows (schedule to stipulation; where no date is shown, the exact date of payment is not in the record):

August 6, 1971 .....	\$ 64,260.00
August 6, 1971 .....	36,125.00
	1,875.00
	750.00
September 7, 1971 .....	68,821.00
September 7, 1971 .....	20,442.00
November 5, 1971 .....	10,072.50
November 5, 1971 .....	1,317.50
November 23, 1971 .....	3,358.35
November 29, 1971 .....	13,430.00
November 29, 1971 .....	2,758.25
November 29, 1971 .....	6,989.55
December 21, 1971 .....	188.70
	<hr/>
	\$230,387.85

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In November and December 1971, Stokely also paid Lennen the following amounts for advertising other than CBS telecasts (comparison of schedule to stipulation with Newberry affidavit, p. 6):

November 5 .....	\$ 41,628.02
November 23 .....	84,348.62
November 29 .....	508,970.42
December 21 .....	308,321.78
	<hr/>
	\$943,268.84

In this connection, the factual argument for CBS is without any support. For CBS it is claimed (Memo, p. 2) that Stokely knew of [Lennen's] financial condition at least as early as December 8, 1971, the claim is based on a letter of Stokely of that date. This letter has no tendency whatever to show any knowledge by Stokely of Lennen's financial condition. For CBS it is also claimed (Memo, p. 2) that the "first inkling" CBS had of Lennen's "financial difficulties" was in October 1971. This claim is supported by no evidence in the record (nor is any such evidence cited) and it is contradicted by abundant evidence in the record CBS knew of Lennen's financial difficulties in the year 1970, as already discussed in detail.

Stokely received a letter from Lennen dated December 16, 1971. This letter was far from informing Stokely of Lennen's financial condition but might have indicated past financial problems while asserting that Lennen was "over the hump". Significantly Lennen in this letter assured Stokely that the creditors of Lennen had agreed that "the responsibility to them was totally" that of Lennen.

On January 16, 1972, three officers of Lennen visited Stokely in Indianapolis and for the first time Stokely learned of Lennen's financial condition, including that Lennen had been diverting Stokely payments for CBS telecasts to other "pressing media bills" (Speirs affidavit, p. 4). The reaction of Stokely was immediate, it declined to deliver a check to Lennen already prepared and (with a minor and irrelevant exception) made no further payments to Lennen.

As above related, CBS withdrew from the committee of Lennen creditors at the end of its meeting on January 27, 1972. It was known at that time that a petition for an arrangement under Chapter XI of the Bankruptcy Act would be filed by Lennen on February 2, 1972 and this was done.

CBS continued to follow the Lennen situation and to keep in touch with the committee of creditors. By February 11, it had become

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obvious to CBS that Lennen could make no "arrangement" with its creditors and that liquidation in bankruptcy was in prospect. CBS determined that its "participation in the ensuing liquidation proceedings could compromise our legal posture vis-a-vis the advertisers", this because "CBS has opted to move directly against the advertisers for past-due monies owed" (Ex. 00).

Then followed the first demand on Stokely for payment, made on February 23, 1972, and the commencement of this action on April 25, 1972.

**7.**

There is no genuine issue as to any material fact and the action should be decided by summary judgment. No demand was made by either side for jury trial and in briefs and oral argument the parties seem agreed that summary judgment should be granted to one side or the other.

There will be summary judgment in favor of Stokely.

**8.**

Lennen had no actual authority as agent to make a contract with CBS binding Stokely as principal. The facts already related make this clear.

Apparently CBS argues that an advertising agency as such has authority to bind the advertiser. The cases cited do not bear out the proposition. Except for one decision, they need not be noticed because they are from other jurisdictions. CBS cites as "the leading New York case on the subject" (Memo, p. 6) a decision of the First Department Appellate Term in 1913 from which Mr. Justice Irving Lehman (later Chief Judge of the New York Court of Appeals) dissented. This is *Clarke v. Watt*, 83 Misc. 404, 145 N. Y. S. 145 (App. Term, 1st Dept. 1913). Advertising was run in a magazine under a contract with an advertising agency; the name of the advertiser was not mentioned in the contract. The ads were not paid for. The advertising agency "disappeared and became irresponsible". The magazine sued the advertiser. The Municipal Court entered judgment for defendant. The Appellate Term reversed for a new trial, presumably on the issue whether the publisher plaintiff gave credit exclusively to the agent. The majority was strongly influenced by the fact that defendant got the benefit of the advertising but had not paid for it. Judge Lehman, in a dissent with which I agree, reasoned that the agency was an independent contractor but if it were an agent, then the plaintiff

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had given "exclusive credit to the agent". The decision seems of no moment in the case at bar.

**9.**

It is equally clear that Lennen had no apparent authority as agent to create an obligation of Stokely to CBS.

Of course, an apparent authority of an agent may be created where there is no actual authority. The principles of law are simple. Apparent authority for an agent to do an act is created by conduct of the principal toward a third person which, reasonably interpreted, causes the third person to believe that the principal has authorized the agent to do the act. Restatement of the Law of Agency Second (1958) §§ 8, 27.

In this instance, (a) did Stokely manifest to CBS that Lennen was authorized to obligate Stokely?; and (b) did CBS reasonably rely on the conduct of Stokely and believe that Lennen was so authorized?

On the record here, the answer to each question is clearly "no".

Stokely had no contacts with CBS and engaged in no conduct which would lead CBS to believe that Lennen had any authority to contract on Stokely's credit. The most that can be said is that Stokely continuously employed Lennen, conduct mentioned in the Restatement, § 8, p. 31. But this can only mean a continuous employment as agent to do the acts in question (see Restatement, § 27, p. 104), in this case to pledge Stokely's credit. There was no such employment and no reason for CBS to think that there was.

Even if Stokely had engaged in conduct which could create apparent authority, CBS did not rely on such conduct.

CBS dealt with Lennen as an independent contractor, not as an agent for Stokely. CBS extended credit to Lennen, not to Stokely. This is shown beyond question by the course of dealing. From the time in 1970 when CBS learned of the financial trouble of Lennen and until February 1972, CBS looked solely to Lennen for payment. There was never a suggestion by CBS in this long and critical period that Stokely was liable to CBS. The demand on Stokely came only after CBS realized in February 1972 that Lennen could never pay its debt. Then CBS "opted to move directly against the advertisers" (Ex. 00).

Even if a finding could be made that CBS relied on an apparent authority of Lennen, the finding would mean nothing in the context of this action because on the facts CBS could not reasonably have so relied.

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**10.**

It would finally seem that under the principle of estoppel, CBS ought not to be allowed a recovery from Stokely.

CBS knew at all relevant times that Stokely was paying Lennen but Lennen was not paying CBS, that Lennen had financial difficulties which increased as time went on, that it (CBS) was extending credit on the Stokely telecasts far beyond that provided in the contracts on which it now sues, that creditors were meeting to see if Lennen could be saved, and finally that at least a Chapter XI bankruptcy proceeding was inevitable. None of this knowledge was disclosed to Stokely—nor even that CBS considered Stokely liable. It would be grossly unfair to permit CBS now to recover from Stokely.

The conclusion does not rest on nor imply any criticism of the conduct of CBS. CBS acted reasonably in its own interest. It tried to keep Lennen alive by all reasonable means, this because it believed that CBS (and all others concerned) would benefit thereby. CBS took the risk alone; it did not share its knowledge of the risk with Stokely, which might have declined to take the risk and have protected itself from loss. Of the two innocent parties, the loss should fall on the party which knowingly took the risk of loss.

The motion of CBS is denied. The motion of Stokely is granted.

The Clerk is directed to enter judgment in favor of defendant.

SO ORDERED.

Dated: New York, New York  
August 30, 1974

INZER B. WYATT  
United States District Judge

**Judgment**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, INC.,	<i>Plaintiff,</i>	72 Civil 1687
—against—		
STOKELY-VAN CAMP, INC.,	<i>Defendant.</i>	(IBW)

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Plaintiff and defendant having moved the Court for summary judgment pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on August 30, 1973, having handed down its Opinion denying plaintiff's motion and granting defendant's motion, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendant STOKELY-VAN CAMP, INC., have judgment against plaintiff COLUMBIA BROADCASTING SYSTEM, INC., dismissing the complaint.

Dated: New York, N. Y.  
September 5, 1974

RAYMOND F. BURGHARDT

Clerk

**Notice of Appeal**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CBS Inc., —against— STOKELY-VAN CAMP, INC.,	<i>Plaintiff,</i> <i>Defendant.</i>	72 Civ. 1687 (IBW)
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NOTICE is hereby given that CBS Inc., plaintiff above named,\* hereby appeals to the United States Court of Appeals for the Second Circuit from the decision and order of the United States District Court for the Southern District of New York (Judge Inzer B. Wyatt) in this action, dated and entered August 30, 1974, denying the motion of plaintiff for summary judgment and granting the motion of defendant for summary judgment dismissing the complaint, and from the judgment of dismissal of said District Court entered in this action on September 5, 1974, upon such decision and order.

October 2, 1974

CRAVATH, SWAINE & MOORE,

by HAROLD R. MEDINA, JR.  
 Harold R. Medina, Jr.  
 A Member of the Firm

Attorneys for Plaintiff,  
 One Chase Manhattan Plaza,  
 New York, N. Y. 10005

To:

MESSRS. LORD, DAY & LORD,  
 Attorneys for Defendant,  
 25 Broadway,  
 New York, N. Y. 10004

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\*Caption changed by order entered June 13, 1974.

**Deposition of W. Marcus Newberry**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,	{	72 Civil 1687 (ELP)
<i>Plaintiff,</i>		
—against—		}
STOKELY-VAN CAMP, INC.,	<i>Defendant.</i>	

Deposition of W. MARCUS NEWBERRY, taken by plaintiff pursuant to oral stipulation, at the offices of Columbia Broadcasting System, Inc., 51 West 52nd Street, New York, New York, on June 26, 1973, at 10:45 a.m., before Roberta Lerch, a Certified Shorthand Reporter and Notary Public of the State of New York.

## [2] APPEARANCES:

CRAVATH, SWAINE & MOORE, Esqs.,  
*Attorneys for plaintiff,*

One Chase Manhattan Plaza,  
New York, N. Y. 10005

By: HAROLD R. MEDINA, JR., Esq.,  
RICHARD HIRSCH, Esq.,  
*Of Counsel*

—and—

MARTIN FRANK, Esq., *of Counsel*  
Corporation Counsel for CBS

LORD, DAY & LORD, Esqs.,  
*Attorneys for defendant,*

25 Broadway,  
New York, N. Y. 10004

By: JOHN J. LOFLIN, Esq.,  
MURIEL BELL, Esq.,  
*Of Counsel*

—and—

H. D. KEYS, Esq., *of Counsel*  
Corporation Counsel for Stokely-  
Van Camp

*Deposition of W. Marcus Newberry*

W. MARCUS NEWBERRY, called as a witness by the plaintiff, being first duly sworn by the Notary Public (Roberta Lerch), and stating his residence as 1048 West 75th Street, Indianapolis, Indiana 46260, testified as follows:

*Examination by Mr. Medina:*

Q. Mr. Newberry, perhaps it would be of help to you if I put a statement on the record. I am trying to use as little time as possible on this examination.

I think both Mr. Loflin and I agree that there [3] is very little fact issue between us. We don't know yet but we don't think so. So that any way that I can get your cooperation in getting the facts down so I don't have to examine other people and bother other personnel of the defendant, I am all for.

Now, against that general background, by whom are you employed? A. Stokely-Van Camp.

Q. In what position? A. My present position is vice president and director of marketing for the canned food division.

Q. Could you give us your background, education, in general, just sort of broad brush it. A. How far back?

Q. Well, did you graduate from college? A. No. I attended—went to high school. Went to work for Armour & Company at age 18. Was transferred in 1943-1944 to Chicago where I entered the University of Chicago and took a course in principles of marketing. Through a connection with the Dean of the Evening School, which was Dean Clark and the president of Armour, I entered Graduate School in Marketing where I concentrated on marketing entirely and finished that in 1947.

Q. What does marketing mean? [4] A. Marketing is the handling of the planning and sales of the canned food products, in my present position of Stokely-Van Camp.

Q. Could you tell me a little bit about the set up at Stokely-Van Camp, the chain of command? A. The chain of command at Stokely-Van Camp is the president, Alfred J. Stokely, the executive vice president, Lyle S. Moore, newly created position, general manager of the canned food division, William B. Stokely, III to whom I report as marketing director of the canned food division.

Underneath me, and subordinate to me, is what we call a marketing directorship concept, consisting of a group of supervisors of three of the major brands and beneath them product managers and beneath me also is a sales manager, who directs a field selling force of four divi-

*Deposition of W. Marcus Newberry*

sional managers, 23 regional managers and some 80 brokers and three direct officers.

Q. Do you have an advertising manager? A. We do not at present have an advertising manager. We have a man whose title is Supervisor of Marketing Services, under which falls the detailed function of advertising. He has nothing to do with advertising.

[5] We had up until July or August of 1971 a man that was called advertising manager but it was in name only. He really had nothing to do with decisions on advertising, just processed the papers and handled communications.

Q. Who would make the decisions as to advertising? A. These decisions are by and large made by product managers, approved by me and then finally approved by top management.

Q. So you would have the initial approval of the entire program? A. Yes.

Q. For how long have you been marketing director? A. I have been marketing director since about January of 1972.

Q. What was your position during the period of April 1971 through December, 1971? A. My position at that time was vice president of product planning. That was the title that I carried.

Q. What were your responsibilities in that position? A. My responsibilities in that position was the supervision of all product planning, the product managers, supervisors answered to me and I answered to H. R. Warren, Jr. who was Marketing [6] Director.

Q. Now, in that position was advertising under your jurisdiction? A. Yes, under my jurisdiction.

Q. Did you have knowledge during the period April, 1971, through December, 1971, that Lennen & Newell was transacting business with various broadcast media in order to effectuate the appearance of commercial announcements on television on behalf of Stokely-Van Camp? A. Yes.

Q. What was the relationship between Stokely-Van Camp and Lennen & Newell? A. Lennen & Newell was our advertising agency.

Q. How long had that continued? A. They were the agency of Stokely-Van Camp, the canned food division, for a period of 17 years.

Q. Was there any written agreement with respect to that agency arrangement? A. Not to my knowledge, there was not.

Q. Were there any changes in the relationship during that 17 years? A. In what respect?

Q. As to the basis on which Lennen & Newell was [7] acting as your agent. A. A change in personnel, organizational structure and that would be the basic change that was made.

*Deposition of W. Marcus Newberry*

When I joined—after joining the company, Stokely-Van Camp in 1962, we changed our company from a produce and sell to a marketing concept and the agency subsequently changed to match that.

I had a supervisor and accounting executive that handled the different brands.

Q. How was Lennen & Newell compensated for their services?  
A. How were they compensated?

Q. Yes. A. They were compensated for the services that they performed at our request, such as, preparation of advertising at a price plus a commission of 17.65. That was things that they did at our request. They were compensated for advertising that they placed by the media.

Q. Did you have knowledge during the period April 1971 through December, 1971, that commercial announcements were being broadcast on your behalf by CBS? A. Yes, I had knowledge that there were broadcasts for Stokely-Van Camp advertising our products.

Q. Now, prior to December, 1971, did you have any [8] knowledge concerning the nature of any contractual arrangements entered into by L & N with CBS with respect to the broadcast of your commercials?

A. No.

Q. Did you have any knowledge as to payments by Lennen & Newell to CBS with respect to those broadcasts? A. No.

Q. Did you make any inquiries of Lennen & Newell as to the basis of any commercial arrangements or contractual arrangements they made with CBS? A. No.

Mr. Loflin: Would you read back the last three questions and answers, please.

(The record was read.)

Q. Now, you tell me generally how Lennen & Newell worked with your organization. A. Well, at the beginning of each year we prepare what is known as a marketing plan, which includes what we are going to sell, what strategy will be used, what will be spent in advertising, what will be spent in what we call trade allowances or trade deals, whether it be cooperative advertising with the retail trade, and this is developed, as I said, at the beginning of the year and revised throughout the year as it required, depending [9] on several situations. The business we are in depends on mother nature and competition to a great extent.

Most of the times we start out with an advertising budget for this particular year and nine years out of 10, this is never all spent because

*Deposition of W. Marcus Newberry*

of conditions and competition and is just cut back—does that answer your question?

Q. Yes, it does.

Did you and Lennen & Newell work jointly in producing those marketing plans? A. Yes, and speaking of me I mean joining with me and the Product Managers and me and Lennen & Newell.

Q. After the product plan was arrived at, what did Lennen & Newell do with respect to it and with respect to implementing it? A. They placed the advertising portion of that plan. They were invited to be involved in the presentation of these plans on a quarterly basis to our sales force, in the field. They were invited, not requested to be there.

Q. Now when they had these quarterly estimates which they conferred with your sales force on, just what did those consist of?

Did they tell you where they were going to [10] advertise, how they were going to advertise? A. They actually did not.

This was handled by our people. Seldom did they enter into direct communications with our sales force. They were just in the audience. The plans were represented by our Sales Manager or myself or our Product Manager and in the case of media in total, yes, it was presented. In the case of print, the sales force was informed an ad would appear in "Life Magazine", "Ladies Home Journal" or "McCall's" or whatever newspaper.

As far as broadcast is concerned, the broker was informed during the ensuing quarter there would be 50 or a certain number of gross rating points of advertising that would appear in his market on such and such a product and described in terms of gross rating points. And it would be seldom more than just days before spot television would they even know—when it would appear or on what station or network.

Q. At some point you received knowledge that broadcasts were going to be made by CBS.

When did that occur? A. Usually very shortly before it appeared. On the spots very short and what time and what station, I did [11] not know—have any knowledge whether it was NBC, CBS or ABC or an independent station. I am just naming the station.

Q. Now, with respect to the content of the broadcast, did you communicate with Lennen & Newell in that regard? A. The content of the commercial?

Q. Yes. A. Yes, these were prepared by the—group with Lennen & Newell and usually farmed out to a production company, which we paid Lennen & Newell for, plus a commission for production of

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advertising, which was the cost of production plus a commission of 17.65%.

Q. Didn't you receive from Lennen & Newell quarterly schedules which showed the stations and dates and programs for the television commercials? A. Not on a quarterly basis. As I said, it was sometimes just days before, especially with spot TV, before the appearance.

Q. But you would be informed by Lennen & Newell prior to the broadcast where they were going to come out, on what station and what time. A. That is right and adjacencies of the program that they would appear, on spot TV, between Love of Life [12] and the news or whatever it may be, depending on the program but seldom, if ever, was there any notification of what network this would be affiliated with, just the name of a station in a particular market, Atlanta, Birmingham or this. They usually go by initials as you know, WFNB or whatever the station may be called.

Q. They would tell you about the stations whenever they were going to come out? A. Yes.

Q. Would they tell you about the network broadcast. A. Yes, the network broadcast is usually a little more advance notice because buying of network time is a little more complicated, it requires more advance notice than does buying spot TV.

Q. So you would know for instance prior to the network broadcast over CBS that your commercials were going to be broadcast over CBS? A. Yes, that is right.

Q. And you were aware of the fact during the period of April, 1971, through December, 1971, that there was being spent in connection with the CBS commercials several hundred thousand dollars, did you not? A. Specifically, no.

[13] Q. Well, what did you think as to the cost of these? A. I did not know—I knew how much money was being spent for network TV, was being approved and appropriated for network TV. I had no knowledge nor was I involved in the decision of what network the ad would appear on because that was based on what the best buy available was. That was left to the discretion of the agency and presented back to me.

Q. But once the decision was made, you would be informed of that decision, were you not? A. Yes.

Q. And you were aware of the fact that a considerable amount of money was being spent in connection with those commercials at CBS, were you not? A. I was aware of a considerable amount of money being spent in that period of time in network—in spot TV but

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not specifically with CBS, no, until after the buy had been made and it came to me for final approval and then communicated to our sales force.

Q. But when you received word of that buy, you knew that a considerable amount of money was being spent with CBS for those broadcasts, did you not? A. I would say, yes, to that but without a lot of [14] concern as to CBS specifically network TV, where it would be NBC, ABC or CBS.

Mr. Medina: Would the Reporter please mark this group of eight invoices as an exhibit for identification.

(Group of eight invoices marked Plaintiff's Exhibit 1 for identification as of this date.)

Q. Looking at Plaintiff's Exhibit 1 for identification, Mr. Newberry, can you tell me whether these invoices are representative of the invoices which you would receive from Lennen & Newell with respect to CBS network broadcasts? A. They are representative but the question was asked: That I received. No, I have never seen this particular invoice. The procedure is that: The agency sends an estimate of a network buy and that is recorded with our, at that time, advertising manager, against the budget and the invoice from Lennen & Newell would go to our Accounting Department. Our Accounting Department then would send it back to our ad manager for checking against the estimate and from there to disbursements where it was paid.

For my personal viewing of these invoices, no, the answer is no. Only whether a discrepancy arose.

Q. But the advertising manager in the period of [15] April 1971 through December 1971 would see these invoices. A. See these invoices.

Q. And approve them. A. And approve these invoices.

Q. And who was the advertising manager during that period? A. April of 1971, it would have been—that would have been Tommy Thomson, C. W. Thomson, I believe.

Mr. Keys: C. E. Thompson.

A. C. E. Thompson in the period of 1971. A. J. Stokely took over in  
7—

Q. Mr. Loflin previously gave me a sheet in which he indicated Mr. Thompson had been the advertising manager prior to August 30, 1971 and Mr. Stokely was the ad manager after August 30, 1971. A. That is right. I wanted to clear that because I can't remember the years. This is Alfred J. Stokely, Jr., the president's son.

*Deposition of W. Marcus Newberry*

Q. Now, the advertising manager would be under your jurisdiction, would he not? A. Yes.

Q. I am just merely trying to avoid having to call an advertising manager, if I can.

Mr. Medina: Now, I ask that these [16] four invoices be marked by the Reporter as Plaintiff's Exhibit 2 for identification.

(Four invoices marked Plaintiff's Exhibit 2 for identification as of this date.)

*By Mr. Medina:*

Q. Now, looking at Plaintiff's Exhibit 2 for identification, are those invoices representative of the invoices forwarded by Lennen & Newell to Stokely-Van Camp covering station broadcasts? A. Yes.

Q. Were those approved in the same way as you have indicated with respect to Plaintiff's Exhibit 1 for identification? A. Yes.

Q. Did you have occasion at any time or anyone under your jurisdiction to question the validity of these invoices that were being sent by Lennen & Newell to Stokely-Van Camp? A. Yes, on occasion.

Q. What would those occasions be? A. When the estimate—when the invoice would come in higher and differed from the estimate in a substantial amount of money.

Q. Do you recall whether any such occurrence took [17] place with respect to the period April 1971 through December, 1971? A. No, I do not.

Q. Now, if there were a difference would that appear in correspondence covering that? A. As a rule, it would be—correspondence would be covering that. Most of the time it would be handled by a phone call or an explanation from the agency of why the difference from the estimate along with the invoice.

Q. It is my understanding that the invoices covering the broadcasts in dispute in this action were all paid in the full amount.

Would that indicate there was no dispute as to whose invoices? A. If they were paid that would indicate. If they were indeed paid the full amount.

Q. Well, I will show you a schedule of payments which we have agreed upon in order to avoid having to examine you as to it and if you look at the invoices on network starting with June 29th and station, starting December 5th—no, February 5th, I beg your pardon, you will note in each instance the Stokely payment coincides with the amount of the invoice which was forwarded by CBS to L & N. [18] A. This would indicate that it was in order.

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Q. So, can we agree that there was no dispute as to these invoices?  
A. To my knowledge, there was no dispute. May I clarify that?

Q. Yes. A. One thing: It could have been cases in point of where some stations or network did not run or the commercial was preempted by a Mayor's speech or something of this nature and the agency then did not receive an affidavit from the station that that commercial was run and a make good was agreed upon at a later date.

Q. Right, thank you.

Mr. Medina: I ask that this piece of paper be marked as Plaintiff's Exhibit 3 for identification.

(Piece of paper with the date December 8, 1971 in the upper righthand corner, marked Plaintiff's Exhibit 3 for identification as of this date.)

Q. Now, can you identify Plaintiff's Exhibit 3 for identification as having been sent by Mr. Stokely to Lennen and Newell on or about December 8, 1971? A. Yes.

Q. Prior to that date, had there been any other [19] communications of any nature between Stokely-Van Camp and Lennen & Newell with respect to the basis on which Lennen & Newell was contracting for television time? A. Not to my knowledge.

Q. When did you first receive knowledge or were you first informed that Lennen & Newell was in financial difficulties? A. Actually, the factual information of financial difficulties came to our attention in January of 1972 from Lennen & Newell.

Q. Prior to that time, had you received any such information? A. We had received only rumors or indications, slight indications that they —were not up to date on their bills, just prior to this time, but upon questioning them, I was assured that everything was all right and I might elaborate: We had a case where Metromedia herein New York called our financial vice president and had a schedule they were not going to run and he called me, and I immediately called the agency, and Metromedia called back within the hour to our financial vice president and said it was all a big mistake, the schedule ran.

We had some instances of newspapers who would [20] call in and say that Lennen & Newell was behind in their payments but when I called Lennen & Newell, "the ad appeared, never a refusal to run a schedule."

Q. Were there any written communications to you, during the year, 1971, concerning the financial stability of Lennen & Newell? A. Not to my knowledge.

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Q. Were there any internal memoranda which discussed that matter in 1971? A. When these rumors persisted, you know, in late 1971, because many phone calls as I said, but we were assured there was no financial problem and in late December, I think there was internal memorandums asking for exactly what—who they owed and what and this was not received in our office until January of 1972, to the best of my knowledge.

May I ask counsel?

Q. Certainly.

The Witness: Is that about the case?

Mr. Keys: Roughly.

Q. Now, have you made a search to see if you have got any such memoranda? A. No, I have not.

[21] Q. Could you do that for me and if you find any let Mr. Loflin have them. A. I will certainly be happy to do that.

Mr. Loflin: Mr. Medina, I just have a clarifying question.

Are you talking about memoranda internal to Stokely where one department perhaps is raising a question with another department?

Mr. Medina: Yes, that is right. I would also make any requests with respect to communications between anyone else relating to the Lennen & Newell financial stability. I am trying to pinpoint the state of your knowledge insofar as it is reflected in any papers that you have.

Mr. Loflin: I would state at this time that the files we have reviewed to date would not be responsive to that in the sense that we know of no such but we will look further and report in accordance with whatever we find.

Mr. Medina: Thank you.

Q. Did you ever at any time request or conduct an audit of the Lennen & Newell books? A. Me personally? No.

Q. Did anybody on behalf of Stokely-Van Camp? [22] A. I have to refer to counsel on this. I believe that an audit was conducted after January of 1972.

The Witness: Am I right?

Mr. Keys: Are you asking me?

The Witness: I am asking you.

Mr. Keys: Do you want this off the record?

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Mr. Medina: I am just trying to get this on the record if I can, Mr. Keys.

Mr. Keys: Do you want me to refresh his recollection?

Mr. Medina: Yes, I would like any information you can supply. I'm trying to avoid calling other witnesses.

Mr. Loflin: Off the record.

(Discussion off the record.)

Q. Prior to January 1, 1972, had you ever requested or conducted an audit of Lennen & Newell's books? A. No.

Q. You knew, did you not, that you had the right to have such an audit? A. No.

Q. Hadn't you discussed that matter with Lennen & Newell when you made the arrangements for them to act [23] as your advertising agency? A. No.

Q. Prior to December, 1971, had you ever taken any steps to insure that monies paid to Lennen & Newell in respect of Media invoices were being promptly and properly forwarded by Lennen & Newell to the appropriate parties? A. No. For the record, one instance: It was from I believe an NBC station in Indianapolis, some time prior to that, made a phone call to our advertising manager and said that Lennen & Newell is behind in their payments with us but laughingly said "they are not as far behind as some of the other agencies. Would you help us get some money" and the advertising manager came in and told me and I relayed this to the account supervisor and asked him to pay. The agency paid the bills and I never heard any more from either party.

Q. When did that take place, approximately? A. It would be absolutely a guess. I would say this was possibly in the summer of 1971, July or August of 1971 because that is a guess. Don't pin me down because it was all verbal.

Q. Is there any way of being more precise? A. As to the time?

[24] Q. Yes. A. No, I can't I am sorry because there was nothing in writing. It was all handled by phone and verbal and promptly discharged.

Q. Now, prior to January 1st, 1972, had you ever taken any steps to ascertain whether money that you were paying to Lennen & Newell in respect of Media invoices was being segregated by Lennen & Newell for that purpose and was not being comingled with Lennen & Newell's own assets or applied to other uses? A. No.

Q. Prior to January 1, 1972, had Stokely-Van Camp ever indicated to third parties that Lennen & Newell was not acting on its behalf in

*Deposition of W. Marcus Newberry*

connection with its various advertising activities? A. I would like you to repeat the question or rephrase it so I can understand what you are asking.

Mr. Medina: Would you repeat the question, please.

(The question was read.)

A. No. Acting on its behalf—

Mr. Loflin: That's all right.

Q. Prior to January 1, 1972, had Stokely-Van Camp indicated to third parties that Lennen & Newell was acting [25] on its behalf in connection with the advertisement of Stokely-Van Camp products? A. Yes. I am rather confused about that question.

The Witness: Would you repeat that.

(The question was read.)

A. A qualified yes in the respect of Media salesmen or these kind of people calling on our people and soliciting for their particular thing. We would indicate to these people that Lennen & Newell was our agency and they were wasting my time and to contact Lennen & Newell,—

Q. Do you recall any inquiries from CBS personnel? A. No.

Q. How much is your annual or was your annual advertising budget in 1971, approximately? A. Approximately 5 million. This is a guess because I would have to ferret this out.

We classify advertising and we put preparations in it and many other things and it goes in what we call our advertising budgets.

Q. But it was several million dollars in any event. A. Yes.

[26] Q. And was most of that paid to Lennen & Newell? A. Most of it was paid to Lennen & Newell, yes, by the canned food division. We have one other small agency.

Q. In 1971, was there any difference of opinion or dispute between Stokely-Van Camp and Lennen & Newell concerning the commercial content or media selection or cost of advertising or any other facet of Lennen & Newell's activities in connection with the transactions which it engaged in with CBS? A. No.

Mr. Medina: Off the record.

(Discussion off the record.)

Q. Was any Lennen & Newell employee on the board of directors of Stokely-Van Camp? A. No.

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Q. Mr. Loflin and I have agreed on a compilation of written documents between CBS and Lennen & Newell which we have in this bound volume and of the invoices by CBS to Lennen & Newell.

Were any of those contracts or communications sent to Stokely-Van Camp by Lennen & Newell? A. No.

Q. And if I recall your testimony correctly, you [27] did not inquire of either Lennen & Newell or CBS concerning those communications or contracts? A. No.

Q. No, you did not? A. No, I did not.

Mr. Medina: That will be all, Mr. Newberry, unless Mr. Loflin wants to ask you some questions.

Mr. Loflin: No, I have no questions.

(Time noted 11:35 a.m.)

W. MARCUS NEWBERRY

Subscribed and sworn to before me this 11th day of August 1973.

GEORGE L. LEWIS  
George L. Lewis, Notary  
My Commission Expires February 28th, 1975

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*Deposition of W. Marcus Newberry*

## CERTIFICATE

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

I, ROBERTA LERCH, a Certified Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That W. MARCUS NEWBERRY, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of July 1973.

ROBERTA LERCH  
Roberta Lerch, CSR

*99a*  
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**Deposition of Louis J. Rauchenberger**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
*Plaintiff,*

*—against—*

STOKELY-VAN CAMP, INC.,

*Defendant.*

72 CIV 1687  
(IBW)

Deposition of Plaintiff COLUMBIA BROADCASTING SYSTEM, INC. by LOUIS J. RAUCHENBERGER, taken by Defendant, pursuant to notice dated April 30, 1973 at the offices of Columbia Broadcasting System, Inc., 51 West 52nd Street, 34th Floor, New York, New York 10019 on June 27, 1973, at 10:30 a.m., before a Shorthand Reporter and Notary Public within and for the State of New York.

[2]

APPEARANCES:

CRAVATH, SWAINE & MOORE, ESQS.,  
*Attorneys for Plaintiff*

One Chase Manhattan Plaza  
New York, New York

BY: HAROLD R. MEDINA, JR., ESQ., *of Counsel*

LORD, DAY & LORD, ESQS.,  
*Attorneys for Defendant*

25 Broadway  
New York, New York

BY: JOHN J. LOFLIN, ESQ., *of Counsel*

ALSO PRESENT:

MR. MARTIN FRANK, ESQ., *Counsel for Columbia  
System Law Department*

MR. RICHARD HIRSCH, ESQ., *of Cravath, Swai-*  
*Ms. MURIEL BELL, ESQ., of Lord, Day & Lor*

*Deposition of Louis J. Rauchenberger*

\* \* \*

LOUIS J. RAUCHENBERGER, called as a witness, having been first duly sworn by the Notary Public, was examined and testified as follows:

*Examination by Mr. Loflin:*

Q. Would you state your name and address for the record please.  
A. Louis J. Rauchenberger, 1 Warwick Avenue, Douglaston, New York.

Q. You are employed by the plaintiff in this action, Columbia Broadcasting System, Inc.? A. Correct.

Q. What position with the plaintiff do you hold? A. I am the controller for the television [4] network division.

Q. How long have you held this position? A. Since September of 1970.

Q. Since 1970? A. 1970, yes.

Q. By whom were you employed prior to that time? A. By The Singer Company for four years, approximately. From 1958 to 1966 I was employed by CBS. I left and went to Singer Company in 1966. I came back in 1970.

Q. In your prior position with CBS, were you also in the controller area of activity? A. Yes, I was director of accounting of the network division for about five years. I was then assistant corporate controller from '65 to '66.

Q. Were you also in controller activity with Singer? A. Yes, assistant controller of that.

Q. When you came back in 1970 you came back in your present capacity of the T.V. network division? A. Yes.

Q. Would you please describe the duties of the controller, the position you presently hold. [5] A. The controller's duties encompass all of the normal financial functions, including the accounting, the budgeting and financial analysis. We run a small data center. The duties also include the billing and collection of receivables. I think that is a pretty good thumbnail description.

Q. I assume you have assistants to help you in these various activities? A. There are approximately two hundred people between the east and west coast.

Q. You have approximately two hundred people reporting to you? A. That is right.

Q. Are your duties the same with respect to the owned and operated stations as compared with the network stations? Would you explain. A. Well, the company owned stations are run by a separate division. I have no financial duties for the company owned stations at

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all. As far as the network division is concerned, the company owned stations are five affiliates.

Q. Let's assume that a credit problem for your owned and operated stations—I believe five is the correct number. [6] A. Yes.

Q. Assume there is a credit problem, would that be referred to your office for follow up? A. No, the station division has their own credit department. If, however, we were having a problem with a particular agency or advertiser, of course, we would talk to each other. We are in the same building. I am not responsible for the collection of their receivables nor are they for mine.

Q. When you speak of your receivables, are you referring to the affiliated stations? A. Receivables—I am talking about receivables from an advertiser who is advertising on the television network.

Q. Explain if you can, the relationship between the television network and the affiliated stations. A. The television network produces programming and sells it to national advertisers and arranges with approximately 200 stations throughout the country to broadcast it. We then feed these programs on telephone lines out to all of the stations where they are broadcast. We don't actually broadcast anything. We then compensate every one of the [7] stations for the amount of network programming that they are broadcasting.

Q. Is it fair to say the affiliated stations charge the network for a certain amount for broadcasting and you pay them? A. That's basically our agreement, right.

Q. You in turn have the arrangement with the various advertising agencies whereby you sell them the network time and they in turn pay you. A. Correct.

Q. Do you know if the owned and operated stations also deal directly with the advertising agencies or do they have their dealings with the agencies through you? A. Our owned and operated stations have their own dealings with advertising agencies and advertisers because there are certain portions of the day or certain time periods in between the network programs that are sold by the local station. These are sold directly by the local stations including the company owned stations. The company owned stations have their own sales department for that kind of sale.

Q. What is the organization that has comparable [8] responsibility for the owned and operated stations? A. Their organization is slightly different. The controller of the station division is Maurice Reid.

Q. Well, do you consider Reid's responsibility with the owned and operated stations comparable to your own? A. No, not really. Mr.

*Deposition of Louis J. Rauchenberger*

Reid reports to the financial vice-president, a position which doesn't exist in the network division. However, if you are interested primarily in the billing and collection responsibility, Mr. Reid has that as I have for this division. However, there is a part of my job, such as the financial long range planning and other parts of my job which Mr. Reid doesn't have.

Mr. Medina: Mr. Loflin, we are dealing or talking about 1971. There was a predecessor of Mr. Reid's in charge at that time I believe.

The Witness: That might be.

Q. Mr. Schrager? A. Mr. Schrager was the credit man. He is not the controller.

Q. It may be that the credit man will be more [9] important in this instance. Do you have a credit man on your staff? A. The man most involved in '71 it seems to me was Louis Werle. He has retired.

Q. What was Mr. Werle's title before he retired? A. Manager of the accounts receivable.

Q. Is that the title you referred to when you indicated someone was the credit man? A. I am not sure whether Mr. Schrager's title is the same or not, but he fulfills the same function. He is the collection man for the stations.

Q. Can you give me his full name? A. Marvin Schrager, S-c-h-r-a-g-e-r. He is the manager of credit and collections

Q. Is it accurate to say that Mr. Schrager's functions for the owned and operated stations would be analogous to those of Mr. Werle? A. I believe so.

Q. At the network level I take it that Mr. Werle reported to you? A. That is correct.

Q. Would you describe in more detail please the exact extent of Mr. Werle's responsibility. A. Let me just—you said he reported to me. [10] Actually he reported through the assistant controller at the time. So he didn't report directly to me.

Q. Who is the assistant? A. Farrel Bushing.

Q. Well, before we go back to Mr. Werle can you tell me what area in the controller's office was Mr. Bushing responsible for? A. He had all of our financial analyses, sales planning and receivables.

Q. Going down the ladder you next come to Mr. Werle? A. Right.

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Q. How would you describe his responsibilities? A. His responsibility was to receive our collection reports, post the accounts, contact agencies or advertisers who were delinquent, to make sure they were up to date. Generally this would concern some kind of discrepancy in the billing. He also made contact with the agency for resolving any billing discrepancy we had.

Q. Again, just so we can delineate these two activities, Mr. Werle performed these functions on behalf of the network. [11] A. Yes.

Q. Primarily Mr. Schrager performed these functions for the five other stations? A. To the best of my knowledge.

Q. You have said that Mr. Werle's responsibilities included work in relation to delinquent accounts. During the period 1970, '71 and early '72, did the network have anything to guide Mr. Werle when an account became delinquent? A. No, we really went by past practice. We didn't have any written standards. There were no written standards and we just tried to keep it current. I don't really know how to answer the question. We did not have any written standards.

Q. I believe you said your procedure was in accordance with practice, past practices. What does that mean? A. Well, the past accounts receivable balances. In other words, if the accounts receivable balances were paid up to about the average level. This is the overall look at the total. As far as a specific account goes, most of our receivables are very current all the time, so if somebody did not pay his bill by the end of the month following receipt of the invoice [12] we contacted them. Generally there was a discrepancy involved. Sometimes it would take two or three months or clear it up because the advertising agency thought one thing had happened and we said another thing had happened and there was usually an on-going dialogue to establish the actual facts. This was usually after the invoices went out of our shop.

Q. If you rendered an invoice and it was not paid by the end of the month following, you would then consider that account to be delinquent? A. Yes, according to our calculations.

Q. It was Mr. Werle's responsibility to find out why it had not been paid and it was his responsibility to telephone and ask for payment; correct? A. Yes.

Q. Has it been your experience that during the years 1970, '71 and early 1972 most accounts were on a current basis? A. Yes.

Q. I would like to get on the record the identification of the owned and operated stations by station name and locality. This is the easiest

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way we can do it if you happen to know offhand. A. WCBS-TV New York, WBBM-TV Chicago, KMOX-TV [13] in St. Louis, KNXT Los Angeles and WCAU-TV Philadelphia.

Q. During the period 1970 through say, February 1972, do you know the names of the people at Lennen & Newell that Mr. Werle contacted in relation to the account? A. I know there was a Mr. Speirs. I met Mr. Speirs himself several times, but I do not know his full name. Jack was his first name. His title was Executive Vice-President of Finance. We did on a few occasions have contact with a man by the name of Donald Campbell and then in late 1971 we met with the new president of Lennen & Newell, a Mr. Lyddan.

Q. In late '71? A. Yes, we met with him, but our normal contact was Mr. Speirs who was the financial contact for the agency.

Q. I take it that Mr. Werle had some internal record that showed balances periodically on all accounts; correct? A. Every month we have a list of the amounts due every month.

Q. Are your records maintained by the sponsor or by the advertising agency? A. I believe the breakdown is by sponsor within [14] the agency. In other words it lists the agency and every individual sponsor within that agency.

Q. So when you get the document every month showing a listing with Lennen & Newell if there are 15 clients doing business with you they would all be listed there; right? A. Yes.

Q. If you had an occasion to discuss the status of an account with Mr. Speirs or someone else at Lennen & Newell, I take it your discussion might not even mention Stokeley-Van Camp. A. That is correct. As a matter of fact the only discussions I ever had with Mr. Speirs about a specific account was about another client, the Florida Citrus Commission. It was another of their large accounts.

Q. I just want to make sure I understand you. The only discussions you had— A. I myself personally. I am not talking about Mr. Werle as a representative of the network.

Q. So in your dealings with Mr. Speirs personally— A. Yes.

Q. —your dealings were about the Florida Citrus account? [15] A. Yes, the Florida Citrus Commission was advertised with the network in the fall of 1970. Their account fell somewhat behind and we had some discussions with Mr. Speirs concerning their billing and a short time thereafter Mr. Speirs informed us that the Florida Citrus Commission asked whether CBS would hold only Lennen & Newell liable for the billing. We told them we would not. In fact, there is a letter in the files attesting to the fact. The Florida Citrus Commission then asked us to bill them directly and not bill through Lennen & Newell. This we did starting the spring of 1971.

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Q. Did you make such arrangements with any other client of Lennen & Newell? A. No, we did not. This was initiated by the advertiser, not by us.

Q. In your experience is that a normal practice? A. There are a few advertisers that request it. Now I'd say we might have 6 to 10 advertisers that get billed directly. It is relatively unusual, yes.

Q. Is it correct that the overwhelming preponderance of the advertising revenues come in through advertising agencies? [16] A. Oh yes.

Q. Do any sponsors who deal direct with the networks do it without going through an agency? A. There is a thing called a house agency. Some advertisers have set up advertising agencies of their own, but we are really dealing with the advertisers directly. A number of sponsors have set up house agencies and there are probably, maybe 15 house agencies that we deal with now. It amounts to dealing with the advertising agency but in reality we are dealing with the advertisers.

Q. A small percentage of allover revenues is through house agencies? A. It is a question of definition. What is relatively small? It is not insignificant.

Q. Less than 10 percent of the advertising? A. I'd say no, probably between 10 and 25. I never tried to nail it down.

Q. Even advertisers in that 10 to 25 percent range have gone through the format of setting up some sort of house agency that they use as a buffer between the sponsor directly and the network; is that correct? A. That is correct. As I mentioned before, [17] we do bill some advertisers directly for the network time. However, they generally place their business through an agency even though the billing doesn't go that way. They are using an agency to service their account.

Q. I take it it would be fair to say at least 75 percent of your business comes through advertising agencies, as customarily understood. A. I would think that is fair, yes.

Q. Do you have with you the monthly statement of Lennen & Newell for the period 1971 and the first two or three months of '72? A. No, I do not.

Mr. Loflin: Could those be produced, please.

Mr. Medina: Certainly.

Q. I take it the documents I have tried to describe would show a breakdown plus the Stokely-Van Camp balance? A. I believe so.

Q. As one of the Lennen & Newell clients? A. No, sponsors.

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Q. Now you described your contact with Lennen & Newell as being concerned with the Florida Citrus [18] Commission. Would it be correct to say Mr. Werle dealt with Lennen & Newell regarding any other accounts that might have had problems or been delinquent?

A. Yes, sure.

Q. This included Stokely-Van Camp? A. I am sure they did.

Q. Do you know if in connection with the Stokely-Van Camp matter he dealt with Jack Speirs or Donald Campbell or Bill Lyddan? A. I don't know for a fact. I assume he dealt with Mr. Speirs.

Q. It is my understanding that Mr. Speirs was the primary contact for these matters? A. Yes, sure.

Q. Does the name Lou Ames mean anything to you in connection with Lennen & Newell? A. Yes, Lou Ames was employed by CBS in the business affairs department. He was an attorney. He left—I am sorry I don't really remember when he left. He went to Lennen & Newell as an attorney for them. I don't believe he ever got directly involved.

Q. In your contact with Mr. Speirs about the collection problems, however, he was personally known by Louis Werle? [19] A. They knew each other and I knew that they talked about the future of Lennen & Newell and what Lennen & Newell was doing in order to solve their financial problems. In the fall of 1970 they had cut their staff substantially and at that time had assured us they would solve all their problems. Lennen & Newell had purchased some small advertising agencies in a diversification move and apparently they fell far short of expectations and caused a cash problem. I am talking about 1970 not '71. This is when the question came up about the Florida Citrus account. At this time Mr. Speirs had assured us they had cut down their size and could now keep their bills current and continue to grow in the normal pattern and I think during that period Louis Werle talked with Lou Ames.

Q. Did you know Mr. Ames before he went to Lennen & Newell? A. I met him—I didn't really know him here. During most of that period I was at the Singer Company.

Q. Did you have any contact with Mr. Ames during 1970, '71 in connection with business done by Lennen & Newell with CBS?

A. No.

Q. You don't recall any meeting with Mr. Ames? [20] A. I remember Mr. Ames was at a meeting toward the end of 1971. I don't remember what the meeting was, just there was somebody from—several people there from Lennen & Newell at the meeting and a lot of representatives from different creditors.

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Q. It is your recollection that counts, not mine. I do have information about a possible meeting on September 2, 1971 which I believe involved Mr. Ames, Mr. Speirs, Mr. Werle and yourself and was supposed to have occurred at the restaurant Mercurio on West 53rd Street. The date is September 2, 1971. A. It is quite possible. I don't remember Mr. Ames being there. I have been there several times. It is right across the street here. I met with Mr. Speirs. I don't remember Mr. Ames. It is possible Mr. Ames was at one of the luncheons, but he was not a significant factor in the discussions.

Q. With relation to the luncheon meeting with Mr. Speirs, was it in relation to the status of the account with Lennen & Newell and CBS? A. Well, I had lunch several times, probably 3 or 4 times with Mr. Speirs in late 1970 and early '71 about the problem of the Florida Citrus account. [21] I recall either all or most of the talks took place at Mercurio's across the street. We had then, I really don't recall how many meetings, toward the end of 1971 when all of our receipts from Lennen & Newell had stopped as of September. I think that was about the last money we got from Lennen & Newell. At that time we had several meetings with them to try to iron out how they intended to pay our bills. The September meeting was undoubtedly one of those. I do remember a meeting with Mr. Lyddan at another restaurant, probably in November of that year. At that time they were trying to explain to us how they were meeting their money problems and how they were going to get their shop in an orderly condition and get on a current basis with us.

Q. Let's stay with the September period for the present. We will get to the later meetings of course. I note there were a lot of these.

About the time, early September, see if you can recall any discussions with Mr. Ames or Mr. Speirs specifically involving the status of the Stokely-Van Camp account? A. You are asking me for my recollection and it is difficult. I know the Stokely-Van Camp was a substantial [22] receivable by that time. I am sure that the problem was the primary reason for the meeting although there were other advertisers also such as Reynolds Metals. I am sure we spoke about both of them. To the best of my recollection at that time our primary talk had to do with their own business, in other words their remaining solvent.

Q. Did the representatives of Lennen & Newell tell you the problem was internal to Lennen & Newell and in fact Stokely-Van Camp was up to date in paying Lennen & Newell? A. They certainly indicated that the problems were internal to Lennen & Newell. They

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explained that they had problems with the acquisitions and they were trying to react by cutting staff and were eventually going to sell off all their branches. Whether or not they ever told us that Stokely-Van Camp was up to date, I don't recall. I think we assumed they were up to date because Lennen & Newell never made a claim that Stokely-Van Camp had not paid them. I don't remember them making that assertion. I think we all assumed they had been paid.

Q. Did you ever at any time communicate with anyone at Stokely-Van Camp concerning the status of [23] their account? A. No, I did not. This of course was all after the advertising had run. Stokely-Van Camp was no longer on the air. That was the summer the Gator-Ade promotion was on. We are talking about September.

Mr. Medina: Let's go off the record.

(Discussion held off the record.)

Mr. Loflin: Back on the record.

Q. Mr. Rauchenberger, does the network have people who call on advertising agencies from a sales point of view? A. Yes, they would call directly on clients too.

Q. It is fair to say since the major part of business comes from the agencies, the greater concentration is directed at the agency rather than the individual sponsor. A. Yes.

Q. From an organizational point of view, how is the sales force organized? Tell us how the sales department worked. A. The sales department is headed by a man by the name of Frank Smith. He is the Vice-President of Sales. The sales staff consists of account [24] executives who are broken down into 4 offices. Here in New York it is called the Eastern Sales Office. There is one in Detroit and one in Chicago and one in Los Angeles. Now, specifically, the out-of-town offices generally make contact with the clients rather than the agency although the Chicago office does a lot of agency work. Most of the salesmen are actually employed through the New York office. With some of the biggest clients like Proctor & Gamble and Ford, the preliminary discussions are held with the advertiser although the paperwork eventually comes from the agency. In addition to the account executives who are organized in those 4 offices, the administrative part of the sales department is concentrated in this building. In addition to these functions there is the sales development function. They try to go out and promote new advertisers. I guess that is the bulk of the organization.

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Q. You have testified in the case of certain large advertisers such as Proctor & Gamble and Ford, you have people dealing directly with the advertisers.

What is the practice as far as Stokely-Van Camp was concerned?  
A. I don't know.

[25] Q. When you say you had account executives, in the case of advertisers such as Stokely-Van Camp would an account executive have been assigned to Lennen & Newell with respect to Stokely-Van Camp; do you know? A. No, I don't know.

Q. Is it your understanding that part of the function of some account executives was to call on advertising agencies and attempt to make sales of commercial time to these agencies on behalf of CBS?  
A. CBS never sells time to an agency. CBS only sells time to advertisers through an agency, so our work is only with specific advertisers. In other words, CBS never sells Gunsmoke to Lennen & Newell. It only sells to Stokely-Van Camp or the Florida Citrus Commission.

For instance, Lennen & Newell could have a budget for a client and come to all three networks and say this is what we need for our clients. Make us up a plan. We would generate a plan which generally involves a mixture of different programs and present it to the agency. This is the case with all three networks.

Q. Are there times for instance when the network [26] has proposed a new program or a new sales idea that they would like to promote and they go to the agency to initiate business? A. Yes, sure, but it would be for a specific advertiser. We would never sell anything just to the agency. We would go to Lennen & Newell and say concerning Stokely-Van Camp we have a great idea to promote Gator-Ade. We would try to sell it on that basis.

Q. You yourself are not directly in the sales activities. A. No.

Q. To your knowledge on a given occasion, perhaps with the introduction of new programs, you are saying that CBS representatives never go to Lennen & Newell and say we have great new programs coming along and we think that some unidentified client of yours might be interested in it, nothing of that sort is ever made? A. We certainly try to promote programs to the trade in general. However, it is against our policy to ever sell to an agency without selling to the client. We will not let the agency be a broker for our time. The salesmen never [27] make a sale except for a specific advertiser. In the case of Callucci, we might say we have it coming up and we would like you to take a look at it.

Q. Are there different salesmen involved for the 5 stations? A. Yes, an entirely different sales force.

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Q. You said Mr. Frank Smith is the Vice-President for the network sales. A. Yes.

Q. Is there a counterpart for the 5 stations? A. Yes, his name is Thomas Leahy. He is the Vice-President of Sales for the station division.

Q. Would Mr. Leahy have staff account executives also? A. I can give you my understanding of it. It is not my particular area of expertise. I believe the station division has a staff of account executives called National Spot Business. They try to sell all five stations at once. In addition to that each individual station has a sales force with account executives. So there are both National Spot Salesmen and local salesmen and of course the local salesmen exist in every one of the 5 stations.

Q. When there are collection problems with [28] delinquent accounts, do you involve the account executives to bring the accounts up to current status? A. In the times when the problem in collections involves discrepancies between what the advertisers thought they ordered and what our salesmen thought they ordered, most of the receivables problems are resolved through the account executive.

Now, if there is no discrepancy in the billing there is no point in going back to the account executives.

Q. In the case of Stokely-Van Camp, did any of the sales persons try to bring the Stokely account up to a current status? A. I don't know. I didn't personally refer it to them—I don't know if Mr. Werle did or did not.

Q. Well, during the period of 1970, 1971 and the first 2 or 3 months of 1972 were your sales people still soliciting business for commercials of Stokely-Van Camp with Lennen & Newell? A. All I know is that the last sales order placed for them through Lennen & Newell was in April 1971. There was no business written after that time.

Q. The last order actually received by CBS [29] was dated in April? I take it the owned and operated stations continued to receive orders through September 1971; is that correct? A. I don't know. The Stokely-Van Camp account paid all the billing up through June. The only thing that wasn't paid was the 2 orders placed in April for the summer Gator-Ade promotion.

Q. You spoke at some length a few minutes ago about the corporate policy concerning the sales to advertisers as distinguished from the sales to advertising agencies. What steps were taken to inform your advertisers that that is your policy? A. You know, it has been the standard practice for so long I think it is generally understood in

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the industry that that is our practice. I don't think we have to go out and broadcast what has been the existing practice ever since the network started.

Q. At any time in 1970, '71 or early '72, did you take any steps to inform Stokely-Van Camp that that was your policy? A. No, no.

Q. Are you aware of any time from 1970 that CBS informed Stokely-Van Camp that that was their policy? [30] A. It is my assumption that Stokely-Van Camp was aware that they were the client and we were looking to them for payment. They are a major advertiser and I assume they have knowledge of the business they are doing.

Q. Are you familiar with the forms of contract used by your network? A. Vaguely, I have seen them. I certainly am no expert on them.

Q. Well, through the efforts of your counsel and some assistance on our part, we have put together a set of documents which the lawyers at least think constitute the documents underpinning this lawsuit. I wonder if by referring to the binder in which these documents appear we might be able to get into the record of the deposition an agreement that these are in fact the regular documents of the network to whatever extent you can confirm that. I invite your attention to this bound volume and particularly to the index. There is a title network transactions and there are 5 exhibits marked A, B, C, D, E. You can turn to Exhibit A, please, and do you recognize Exhibit A as a form used by CBS television network? A. That is a normal sales order form.

[31] Q. What is its function? A. This is to certify that a sale has been made before the contract was made up. It is also an input document to our computer system. It is the document which our sales force uses, as you can see by the signatures on the bottom, including that of Mr. Philpot. It is made up by the administrative section of the sales department.

Q. Is a copy of the document sent to Lennen & Newell? A. I don't know.

Q. Following the CBS television network form for sales orders, would you describe what those entries mean. A. Yes, if you look at the form itself you will see, on the top of the form, it says "per attached daytime schedule." This is the attached schedule which lists the specific commercial positions that the advertiser has purchased.

Q. The left-hand column I take it the entry such as "Storm" is the name of a— A. An abbreviation for the program. That is "Secret Storm".

Q. Underneath the word "Storm" appears 4 entries [32] each reading 60 seconds. I assume that means the length of the commercial.

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A. Correct, your binding obscured that point. The date is next to the figure 60 seconds, the specific day and the length of the commercial from 2:30 to 3:00 p.m. in the afternoon.

Q. Daily M-F means Monday through Friday? A. Correct

Q. That form continues for two pages then there appears a list of stations, beginning with Prescot and ending with Albany and underneath these stations "will not run Stokely-Van Camp". Will you explain that a little bit more, please? A. Well, it would appear that Stokely-Van Camp did not buy the full network. That is the portion of the network they elected not to purchase.

Q. Just from the list here it appears that a certain portion of the northeast was left out. A. They probably did not distribute Gator-Ade there. Probably this was one feed or telephone line so they took out these particular stations.

Q. You have an arrangement to sell whole networks or various portions thereof? A. Yes, generally we try to sell the whole network [33] but there are occasions where advertisers only buy a portion of the network, or the advertiser may buy a portion and run different commercials.

Q. Following that page under what is marked here as Exhibit A, we come back to the same form we started out with which in this instance is designated order number 71-523—A. We will see the supplement number 1 is the original and the 7-523—

Q. 71 refers to the year? A. Correct.

Q. 523 is the order number? A. Yes.

Q. We have 3 supplements? A. Right.

Q. They are simply amendments to the business order? A. Correct, you will notice in all three of them there are no changes in price just a shift of some minutes from one program to another.

Q. These documents are marked with various dates received and the name Anthony G. O'Mally. A. He is in the business affairs department. I don't know his exact title. He is responsible [34] for the preparation of the sales orders which is the form of document you get later on. The television network agreements are prepared by Mr. O'Mally.

Q. Mr. O'Mally takes the information from the order number, let's say order number 71-523 and prepares another document? A. Correct.

Q. Would you tell me what document that might be? A. You will see under Exhibit C called the television network agreement—

Q. Well, with reference to Exhibit C that seems to refer to two sales orders 71-523— A. I believe the /3 refers to the third supplement.

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Q. So we are talking about one order? A. Yes.

Q. In other words the entry under Exhibit C appears to be a letter of transmittal from Mr. Dillon to Mr. Strom of Lennen & Newell. What is Mr. Dillon's function? A. He is the administrative section of the sales department.

Q. Would that include keeping track of orders? A. That would include transmitting them to the [35] advertiser, I guess.

Q. I invite your attention to Mr. Dillon's letter dated May 25, 1971. What we are talking about is Exhibit C, where Mr. Dillon says to Mr. Strom "If you find agreement to your order, kindly sign and return to me for counter-signature. I shall return the fully signed copy for your files." Was that ever done? A. I don't know. Less than 10 percent of our agreements are ever signed. The trade practice is to make deals without signing agreements.

Q. Nevertheless I take it you go ahead with the commercials and keep asking for signature whether the agreements are signed or not? A. Yes, we have major agencies in New York City that have not signed television agreements with any of the 3 major networks in their existence, which is over 30 years. It is just a practice that has grown up in the industry. Very few of them are ever signed.

Q. Let's turn to Exhibit B for a moment. A. Exhibit B appears to be a letter from Lennen & Newell signed by Nat Strom to CBS, attention Mr. Ginway.

[36] Q. Who is he? A. He is an account executive in the sales department.

Q. Do you happen to know who signed or handled the correspondence in the Lennen & Newell matter? A. I don't know.

Q. Do you recognize Exhibit B as the customary form of order received by your network from Lennen & Newell? A. We frequently get a letter something like that from the agency which specified the kind of broadcasting and so forth. Whether or not it is the standard form, it just outlines their understanding of the agreement.

Q. I note among others on page two a letter there refers to this Secret Storm, the dates and time period as well as other programs. Would it be your understanding that this letter from Mr. Strom dated May 4, 1972 was formalization of the verbal order responded to on May 25 by Mr. Dillon in his letter to Mr. Strom which we were discussing a minute ago as Exhibit C? A. Yes.

Q. Do you note on page 6 of that acceptance [37] has already been given of this order? A. The document we were working on is the first one here.

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Q. Do you recall the sales order? A. Yes, the agency formalizes it in this way. Then we formalize it in this way (indicating by touching certain pages in the document book). 6

Q. Turning your attention to Exhibit D for a moment, this appears to be a modification of times or programs and the running of commercials contemplated by the earlier agreement. Is that your understanding of this document? A. Well, this may have been due to a technical error. Whenever the commercial is not run due to a technical error either by our failure or by AT&T, we normally give the advertiser what we call "Make good." We give him another commercial position without charging him to compensate him for the loss of the value of the commercial due to technical error. If it is a minor thing where he might lose 2 or 3 seconds out of the commercial, we wouldn't give him a commercial in the middle of the day, which is quite valuable, but perhaps a commercial in "the morning news."

[38] Q. Without attributing it to anybody assuming there is a failure where the entire commercial was lost and you just couldn't show it, then would you get into what is called a "make good?" A. He would be given the value.

Q. Is that something that would be negotiated by CBS and the agency? A. Yes, the account executives and the agency.

Q. You would propose what you would consider to be the equivalent? A. Yes.

Q. This seems to be one of such— A. Confirming.

Q. By this, I am referring to Exhibit D. A. Yes.

Q. Now we turn to Exhibit E which is described in the index as CBS invoices June 29, 1971 through December 2, 1971. Do you have those in front of you there? A. Yes

Q. Do each of the invoices relate back to sales orders that started off as Exhibit A? I note the first is per sales order 71-523. A. Yes, that one does. The second one does, [39] the third one also refers to that sales order and the fourth is a different one. It is a minor adjustment of some kind. Yes, they all refer to that sales order, the last three seem to be some kind of adjustment which I would have to research.

Q. Let's start with the first one, at the bottom of the page on the left-hand side it says gross billing. Underneath that are some numbers 22458. Does that mean \$22,458? A. Correct.

Q. On the right is a box that says agency commissions of 3370. Is that \$3,370? A. Yes.

Q. I haven't done the mathematics, is it customarily 15 percent? A. Yes, 15 is the customary account. The actual amount of the invoice

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which CBS expects to receive, and is posted in the receivables record, and is on the right-hand corner. It is obscured but it is \$18,098. Do you see that in the lower right-hand corner? That is actually the amount of the invoice. The gross billing and the agency's commission are put there for the convenience of the agency. You start with the gross billing and deduct the agency's commission and [40] come up with \$18,098.

Q. Does your network have any understanding with the advertising agency as to the amount they are to bill their clients? A. No.

Q. You have no understanding with them that they are to bill the gross figure rather than the network figure? A. No, in many cases the arrangement between the advertising agency and the client is not 15 percent. It is well known in the industry that many of the major clients compensate an agency on a fee basis and not on a commission basis. However, we still do this for the convenience of the agency. They effectively compare the size of each agency by calculating what the gross billing is. It has a loose meaning within the industry historically. It goes back 20 years. The 15 percent commission is changing. It is sort of an anachronism.

Q. The period we are talking about is 1970, '71. Was the 15 percent commission considered standard? A. No, I know for instance that Lorillard was compensating Lennen & Newell on a fee basis.

Q. Do you know if Stokely-Van Camp was compensating [41] Lennen & Newell at any particular rate? A. No, I don't know what their rate was.

Q. Turn if you will to the next invoice. The first invoice was dated June 29, 1971. The next one appears to be dated August 2, 1971. Now in this one the gross billing is \$75,000; is that right? A. It looks like \$75,600.

Q. All right, \$75,600.

Mr. Medina: Off the record.

(Discussion held off the record.)

Mr. Medina: Back on the record.

Q. All right, there appears to be another invoice of the same date, that is August 2, 1971 and the gross billing is \$2,206. There are a number of entries intending to explain that invoice. Can you describe what this invoice intends to be for? A. Yes, in addition to the network contract amount there, there is a charge that we make to advertisers for inserting a color commercial instead of a black and white one. It

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is \$125 per insertion. This invoice is for color charges. You note at the bottom 15 inserts at \$125 net color charge.

Q. That is a basic time charge when there is a color insertion? There is a \$125 charge each [42] time? A. Right.

Q. If the commercial goes 60 seconds? A. It doesn't matter. It is the number of insertions.

Q. So the \$125 would apply whether the time is 30 or 60? A. Right, it concerns the technical costs involved in inserting it.

Q. The next invoice is also dated August 2, 1971. In this the gross billing is \$735. I see the notation color charge. Is it of the same nature as the prior invoice? A. Yes.

Q. Just the amount is different? A. Yes, actually the second invoice covered the programs that were broadcast in the month of June. The prior was the programs broadcast in the month of July.

Q. The next invoice is dated September 2, 1971 and the gross billing is \$3,034. There appears to be some numbers there following the letters ADJ that I think might refer to adjustment of invoice but I am not sure. Could you explain that? [43] A. That is invoice 7-245-422.

Q. Is that one of the other invoices in this series? A. That is what I am trying to see. Yes, that is the second invoice. It refers to supplement number 4 which we unfortunately don't have on this page.

Q. Perhaps we can find it someplace. I would hope so. We have described the invoice which has a gross billing of \$75,600 dated August 2, 1971. We are now discussing invoice number 02-24-5455. Now the following invoice is also dated September 2, 1971. It has a gross billing of \$80,966 and appears to be for commercial positions pursuant to the original purchase order. A. That is correct.

Q. We will get to the last invoice which has a date of December 2, 1971 and this appears to be for a credit amount of \$625. It says to cancel the invoice of July number 7-31-31 which—

It should be 41. They were the June color charges for the Gomer Pyle and Lucy, invoice 07-31-0031 of \$625 net, and was cancelled by the net credit in the same amount. A. Correct.

[44] Q. Mr. Rauchenberger, we have gone into the network transactions commencing April 2, 1971 and the next section of this volume involves Exhibits F, G and H.

Exhibit F, I take it again is the same form that you have described as Exhibit A. A. Yes, I might point out that the sales order 71-528 covers prime time availabilities while the prior sales orders covered daytime. It also clarifies the limitation of the northeast here

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where 88 percent of the national feed went to Stokely-Van Camp and Reynolds Metal picked up the feed for the northeast.

Q. Is that National Feed by way of describing the total? A. The network.

Q. Could we conclude from this that there were stations that carried commercials for Reynolds Metals at the same time the rest were carrying commercials for Stokely-Van Camp? A. Right.

Q. Now we get into Exhibit G which appears to be a comparable list at least in function as Exhibit C. Would you agree with that? A. Yes.

[45] Q. It is used for different sales orders? A. Yes.

Q. We do not have in this transaction an exhibit comparable to Exhibit B that is a letter from Lennen & Newell. Do you know why that might be? A. No, that surprises me. I was just looking at Exhibit B to make sure that it didn't cover both. It does not. Generally we get a letter from the agency.

Mr. Loflin: Mr. Medina, could we have a check on that?

Mr. Medina: We have already checked it. We are unable to locate that letter if it does exist.

Q. Mr. Rauchenberger, I take it with your comment you would expect to receive such a letter, but that you might be unable to locate it at this late date. A. That is correct.

Q. Exhibit H again appears to be a series of invoices that at least in form are comparable to those listed in Exhibit E for the other orders we discussed. A. That is correct.

[46] Q. I take it you don't see anything in these forms that are different in any way as to format? A. No.

Q. I invite your attention to what is described as station transactions commencing December 10, 1971 and Exhibit I described as a WCAU Philadelphia agreement. Do you recognize that as a CBS television station national sales agreement? A. No, I have no knowledge of their forms and workings. I can read the form. I have never seen it before. It is the station division.

Mr. Medina: Mr. Loflin, would it help things if we were to stipulate that it is a standard form? That is my understanding of it.

Mr. Loflin: Well, I certainly wouldn't want to press this witness in areas he is not responsible for and forms he is not familiar with. I will have to just reserve the questions as to

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whether it is going to be necessary to bring in anybody who can—

Mr. Medina: Of course that is our understanding.

Q. With respect to Exhibit J, are you familiar with that form which has at the top the caption CBS [47] Television Stations? A. No.

Q. That would be out of your knowledge? A. I think the remainder of the binding—

Mr. Medina: It is my understanding with respect to all of the forms they are standard forms.

Q. With reference to these exhibits the answer is that the station transactions are covered by Exhibits I through HH?

Mr. Rauchenberger, I take it all of these are in the other division that you are not responsible for? A. That is correct.

Q. With reference to the last two exhibits, I now refer you to Exhibit II, this is a CBS network letter dated February 23, 1972 addressed to Mr. Burkhead. Who is Mr. Burkhead? A. Controller of Stokely-Van Camp Inc.

Q. Did you write this letter, Mr. Rauchenberger? A. It was written by our legal staff. I don't recall who signed it.

Mr. Loflin: Can we go off the record?

Mr. Medina: Surely.

[48] (Discussion held off the record.)

Mr. Loflin: Back on the record.

Q. Is it correct, Mr. Rauchenberger, that the letter of February 23, 1972 which is described as Exhibit II was signed by you? A. That is correct.

Q. Was it mailed on or about the time dated that is February 23, 1972? A. Yes, that is what my recollection is.

Q. The next exhibit, JJ is a letter sent by CBS to Mr. Burkhead. Do you know who signed that one? A. No, I don't.

Q. Finally there is Exhibit KK which is a letter addressed to you from Howard D. Keys of Stokely-Van Camp. Did you in fact receive such a letter? A. Yes, I did.

Q. Shortly after March 13, 1972? A. I believe so.

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Q. You have noted that this last Exhibit JJ in effect consists of two letters one addressed to you and one to Mr. Reilly. The point is that you wrote to him and you got one back. A. Right.

Mr. Loflin: Off the record.

[49]

(A lunch recess was taken.)

AFTERNOON SESSION  
1:30 P.M.

LOUIS J. RAUCHENBERGER, resumed the stand and testified further as follows:

*Examination by Mr. Loflin (continued):*

Mr. Loflin: Back on the record.

Mr. Medina: I think we have solved the mystery of supplement number four. Number 71-523. That is shown on Exhibit D and also it is the invoice appearing on Exhibit E as the first invoice.

Mr. Loflin: Thank you for bringing that to my attention. It appears that the document that we thought was missing is in fact already in our binder. In the morning session Mr. Medina I asked for the production of the monthly statements referred to by the witness. Will those be produced today or at some later time?

[50] Mr. Medina: Well, this is a difficult task because we have to get them off of tapes. This will take some time. If you want to examine Mr. Rauchenberger again after getting them, you may.

Mr. Loflin: I understand the problem that you have.

Q. Mr. Rauchenberger, this morning after noting your return to CBS in September 1970 you later described efforts on behalf of Lennen & Newell representatives to explain some financial difficulties occasioned by the acquisition of small agencies.

Can you say when in 1970 or '71 this explanation was given to you? A. Not exactly. Probably either December of 1970 or January of 1971. My recollection is that it was to the end of the year. Probably before the end of the year. They were slow in paying the Florida Citrus account.

Q. Just that one? A. It was the main one to my recollection. The specific one we talked about.

Q. Was Mr. Speirs the principal spokesman for Lennen & Newell?

[51] A. Yes.

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Q. As controller responsible for accounts receivable, did you find his explanation satisfactory? A. Well, in addition to his explanation he assured us that he would shortly get up to date on his payment. So we gave him a little more time and he did in fact bring the payments up to date.

Q. Some time after your conversation in December or January with Mr. Speirs whatever the delinquent accounts may have been with Lennen & Newell's clients, were they brought up to date? A. Yes, I remember in addition to their bringing the delinquent accounts all up to date that was about the period it was proposed in March or April of that year that the Florida Citrus Commission requested to be billed directly so that the Florida Citrus Commission would then be kept current all the time.

Q. Well, I think the best evidence of the status of the other accounts is probably in the records. A. Yes.

Q. I would like to know if after your discussions with Mr. Speirs, did you issue any special [52] instructions to Mr. Werle concerning Lennen & Newell's accounts? A. I suggested that Mr. Werle keep very current with them, make sure he saw them every other week and to find out what was going on in the agency and to make sure they were up to date on accounts and not getting any further behind.

Q. Did Mr. Werle in fact actually keep in close touch with Lennen & Newell thereafter? A. He certainly did up to the time they were current again. Once they were reasonably current or as current as most other agencies I don't know if he kept up his every other week contact with them. But certainly during the period from the end of 1970 through, oh probably April or May of 1971 he did. That was when the Stokely account for a while got somewhat behind and got into the 60 day category and they finally caught up to date in June. Then of course we started having trouble again in the late summer of 1971. We had no payments at all during the summertime and during this time I am sure Mr. Werle was calling them at least every other week. I don't know whether he had any face-to-face meetings with Mr. Speirs other than the [53] telephone contact or letters prior to the meeting you mentioned earlier in September. He may have, I just don't remember that.

Q. Does CBS participate in any credit group or credit organization in the New York area? A. There is a broadcasting creditor group. Mr. Werle did belong and Mr. Peterson belongs to it and I am sorry I don't recall the name of the organization offhand. I can find that out for you.

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Q. Have you ever heard of an organization called the New York Credit and Financial Management Association? A. That is probably it.

Q. To your knowledge does it have an affiliated group known as the Radio and T.V. Credit Group? A. I really don't know. We should ask Mr. Peterson this question. There is an organization of different credit people in the broadcasting industry which gets together occasionally and alerts each other as to the problems of collection among the different clients.

Q. Have you ever attended a meeting of that group? A. No.

[54] Q. Mr. Werle? A. Mr. Werle did and I believe Mr. Peterson does.

Q. It is my information that on May 18, 1971 Mr. Werle was at a meeting of this organization at which Mr. Jack Speirs appeared on behalf of Lennen & Newell and I take it you were not present at that meeting? A. No.

Q. Did you get any report from Mr. Werle as to what went on in that meeting? A. I don't recall.

Q. Do you recall getting any memoranda or any other kind of communication from Mr. Werle concerning the activities of this credit association?

Mr. Medina: I have carefully gone through these files, Mr. Loflin, so I am sure such memoranda does not exist.

A. I know of the existence of it. I know the organization was there. I don't think we have any correspondence concerning it.

Mr. Loflin: Mr. Medina, I didn't make that part of our list of inquiries to you. I didn't mention the group to you before.

[55] Mr. Medina: It is my understanding that we were to produce any documents in our files for 1971 which had to do with the financial position of Lennen & Newell and we have done so. We have provided these documents to you.

Mr. Loflin: I have been advised that this organization puts out communications. Of course, I have no knowledge who precisely at CBS would receive such communications nor have personal knowledge of it. I have been advised that Mr. Speirs appeared before the group and thought the activity might be reflected in a report that the group periodically publishes to the members. If you don't have it, you don't have it.

The Witness: I can take a look in Mr. Werle's files. I did not get it to my recollection.

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Mr. Medina: We will make a search again, Mr. Loflin, to make sure these papers do not exist. If they do we will provide them.

Mr. Loflin: Thank you.

Q. In the late summer or early fall of 1971, did Mr. Werle have any occasion to alert you with [56] respect to any financial conditions concerning Lennen & Newell? A. Well, he alerted me to the fact that the billing was getting very late again. I mean our receivables. We had not received payment for July and August and they were 90 days past due in the billing.

Q. What if anything did you do about that? A. I surely acted. I mentioned earlier the meeting we had with Mr. Speirs early in September which Mr. Ames was at. You know this area gets very confusing. There were several meetings late in the year including people from other networks and their representatives. So it is hard to pinpoint what was done specifically at a certain time. I know we certainly started discussion with them after the summer of 1971 on a fairly regular basis.

Q. I suggest to you based on information there was a meeting at which you were supposed to have been present on September 2. I also have information that Mr. Ames met with Mr. Werle on August 18 for a luncheon meeting. I wonder if you recall Mr. Werle's giving you any report as to the results of that meeting? [57] A. I really have no specific recollection of that.

Q. We will then come forward from September 1971. Would you describe the information that you received concerning Lennen & Newell's financial position? A. They had at one point given us an estimate of their operating budget for the coming year and how they had pared down the staff so they would be in a break-even position.

Mr. Loflin: Do you have documents, handwritten documents?

Mr. Medina: Is there a memorandum dated November 15, 1971 which is a piece of paper to which you refer?

The Witness: Yes, as I recall they did this a couple of times.

Q. Are you referring to a pro forma balance sheet? A. That is a pro forma operating budget.

Q. Did you obtain this personally or did Mr. Werle bring it to you? How did you get it? A. I think it was promised at one of these luncheons and then sent over.

*Deposition of Louis J. Rauchenberger*

Q. Do you know approximately what time you [58] got it? A. No, I really don't. There is a date on the document.

Q. What is the date there? A. It is '71.

Mr. Medina: November.

A. November 15, 1971.

Mr. Medina: We were able to find a document dated November 15, 1971 and another statement headed New York Office Income for Lennen & Newell Inc. saying Revised December 26, 1971.

A. This was the period during which several of their clients were starting to leave them. The operating document was based on the assumption certain clients would stay with them and showed they would be in a profit making position for the coming year.

Q. Do you know which clients were thinking of leaving because they discovered that Lennen & Newell were not paying their accounts with the network? A. Yes, it is a judgment on my part. I can't make a statement. I know they had cut their staff and these clients may have been unhappy with the services. [59] I don't know why they left them but a substantial number of advertisers left in the fall of 1971. That is what finally led to their insolvency or their going into bankruptcy.

Q. Mr. Rauchenberger, wouldn't it be your opinion that the clients discovered that they had been paying the agency several hundred thousand dollars and the agency in fact had not paid the invoices against the money which had been forwarded to them, would you not say this was a major factor in their displeasure with that agency? A. Yes.

Q. It is the sort of activity the advertiser finds inexcusable, is that correct? A. Yes.

Q. Well, at this time we are talking about you had assumed that Stokely-Van Camp had paid Lennen & Newell all that was due under its invoices and you knew Lennen & Newell had not kept faith with CBS and you said that it is your policy to hold the advertisers directly responsible. Why then didn't you notify the advertiser that you were in fact going to hold them responsible? A. Of course we did, but several months later. [60] The financial problems with Lennen & Newell at this time were very well publicized in the advertising pages of the Times. I assume at the time that Stokely-Van Camp were very much aware of the problems with Lennen & Newell as I am sure their other advertisers were. I don't know if they had the right as clients

*Deposition of Louis J. Rauchenberger*

to look over their books. I assume that they knew the difficulties Lennen & Newell were having.

Q. You really concluded that even though hundreds of thousands of dollars had been paid to Lennen & Newell by Stokely-Van Camp and had not been forwarded to you, that Stokely-Van Camp would continue that relationship on the face of that default? A. I assume Stokely-Van Camp was interested in seeing Lennen & Newell as an agency work out its financial difficulties.

Q. Isn't it correct to say that CBS wanted Lennen & Newell to continue as an agency because of the amount of orders placed with CBS? A. I don't know that Lennen & Newell preferred us to any other network. I don't know the specific value of the agency. However, we had been dealing with Lennen & Newell over a period of time and I am sure CBS preferred to continue the relationship.

[61] Q. Is it a fact that they extended the terms of payment over some months to Lennen & Newell? A. I wouldn't say that. We tried to get them to pay from the assets they said they would have. We were not certain how they were going to get these assets to pay. We didn't say you don't have to pay us.

Q. In fact you didn't turn over the accounts to your attorneys to bring suit? A. It depends on the time frame you are talking about.

Q. Any time up to February of 1972. A. Well, that is when we did.

Q. But not until then? A. That is correct.

Q. Were there meetings of contractors of Lennen & Newell during the months of October, November or December 1971? A. Yes, there were.

Q. Were you represented at those meetings? Did you personally attend? A. I was at least at two of them and Mr. Werle was at least at one or two more. I was not at all of them. Also we have a corporate credit and collection [62] man, Mr. Pabst was his name, who attended all of them.

Q. Who does Mr. Pabst work for? A. The corporate treasurer. He is no longer here. He was the corporate assistant treasurer for credit. He has been replaced several times.

Q. Mr. Rauchenberger, we again are deep into the corporate organization which I find somewhat puzzling. Your division has to do with the national television? A. Yes.

Q. There is another division that has to do with the stations. There is a gentleman on top of that. A. Yes.

Q. Do you report to him? A. No, I report to the President of the network, which is a line operation.

Q. Is there a corporate controller? A. Yes.

*Deposition of Louis J. Rauchenberger*

Q. Is his job similar to yours? A. More or less.

Q. But Mr. Pabst reported to the treasurer? A. That is correct.

There is no division [63] treasury function. All of the treasury functions of the division are under the treasurer at the corporate staff level. He reports to the Financial vice-president.

Q. As precisely as you can as to dates, can you please tell us in order about these meetings of the creditors. First the ones which you personally attended. A. Unfortunately I never kept notes. There is correspondence here that has some dates.

Mr. Medina: The witness has before him the document we have already produced for you Mr. Loflin.

A. The first document mentions a meeting that we were supposed to have on the 17th of November which we did and Mr. Pabst's memos are a summary of what happened at that meeting.

Mr. Loflin: Your counsel has turned over to me a number of memos by Mr. Pabst in the fall of 1971.

Q. Did Mr. Werle have any memorandum at the time, recall? A. Not that I can recall.

Q. The memorandum, the date looks like it is [64] November 9, 1971 and reference is made in it to a meeting of October 29 and the author is Mr. Pabst and he says present at the meeting were L. Rauchenberger, L. Werle and M. Reid and so on. After your name for example there appears the initials C.T.N. A. That is Columbia Television Network. That is the network division.

Q. C.T.S. A. That is the stations.

Q. Does this memo refresh your recollection with respect to the meeting of October 29? A. I think that was a meeting at which they promised to send us this estimate of their budget for the following year to see if they could work their way out of their financial difficulties.

Q. Last line on the memo of November 9, 1971 says Mr. Rauchenberger agreed to work with the agency for another two weeks until November 12, 1971, what does that mean? A. Well, we don't want to start any legal proceedings against them for two weeks?

Q. Did you ever start any legal proceedings against them? A. No, we did not.

[65] Q. Was your agreement to defer legal proceedings in response to some representation made by Mr. Speirs or Mr. Cambell? A. Yes, they said at the time they felt the company had settled their

*Deposition of Louis J. Rauchenberger*

cost problems and would be in a profitable position for the coming year at which point we would become current in our receivables.

Q. Is it fair to say you wanted some evidence of what they were talking about and they agreed? A. As I recall the talk, there was a possibility of their merging with 3 or 4 companies and this would bail them out of their financial problems.

Q. At some time they said to you that if one of the mergers they had in mind went through their cash position would be substantially improved? A. Yes.

Q. To your knowledge did any of the mergers go through? A. They did not.

Q. They subsequently however, provided you with an income for costs in a document dated November 15, 1971. A. Right.

Q. That document subsequently was revised [66] because some of the Lennen & Newell clients had left them. A. Right.

Q. That was followed with a revised estimate of the billing and income as of December 26, 1971. Is that also correct? A. I really don't remember the date that we received this.

Q. I believe I am referring to the billing income statement of December 26, 1971. A. I don't have a date on that.

Mr. Medina: Yes, that is right.

A. It was at the end of October that we were talking with Lennen & Newell ourselves. Just CBS. Shortly thereafter some other contractors joined the group and there is a memo of November 29 which summarizes the meeting between ABC, Metro-Media, G.E. Broadcasting, Mr. Schwartz who was the insolvency attorney for ANPA and Blair & Company.

Q. Did you attend that meeting? A. Yes.

Q. You had mentioned earlier an agreement which said that Lennen & Newell were going to be able to pull themselves together. Can you explain [67] how it was all going to work out? I take it that your action was comparable to the action of the other creditors. You all agreed to wait and see what was going to happen. Is that a fair statement? A. Certainly we did at the meeting at the end of the month.

Q. After that date, did you personally participate with other significant creditors of Lennen & Newell where you all agreed to give them further time to work out their problems? A. Correct, at that meeting I think this revised forecast was requested and also the balance sheet was requested.

Mr. Loflin: I would like to have the financial statement marked as an exhibit. What do you suggest?

*Deposition of Louis J. Rauchenberger*

Mr. Medina: I think we can deem it an exhibit in the compilation of primary documentary exhibits which run from A through KK. We can mark this document as LL and add this document to the next compilation of documents or if you wish we can start out with new letters.

Mr. Loflin: Why don't we just continue the double letters and mark it as LL.

[68] Mr. Medina: Yes.

Mr. Loflin: I ask that the billing income for the date November 15, 1971 referred to by the witness be marked as Exhibit LL.

(Billing income of Lennen & Newell dated November 15, 1971 was marked as Exhibit LL for identification, as of this date.)

Mr. Loflin: I would also ask that the financial statement referred to by the witness of Lennen & Newell revised as of December 26, 1971 be marked Exhibit MM.

(Financial statement of Lennen & Newell revised as of December 26, 1971 was marked as Exhibit MM for identification, as of this date.)

Q. One of the memoranda provided to me by your counsel, Mr. Rauchenberger, appears to concern a Mr. Shaklan. Would you further identify Mr. Shaklan. A. I am sorry which memoranda is that?

Q. February 15, the last one in the series. A. Mr. Shaklan—he is an attorney in the legal department.

Q. At what point was Mr. Shaklan asked to begin attending the creditors meetings of Lennen & Newell? [69] A. There is a note here on the meeting of December 27—at least as far back as that. I know he was not at the meeting at the end of November, November 27 was the first one we had. So, somewhere then between that time and December. He is not listed as attending the one for December 13. I think December 27 is the first one he attended.

Mr. Medina: I can check on it.

Q. Mr. Shaklan's memo is addressed to you, Mr. Werle and others of February 15, 1972 refers to a new plan of arrangement of Lennen & Newell whereby creditors will receive 25 cents on each dollar.

Did representatives of CBS attend any further meetings after February 15, 1972? A. I don't believe so.

*Deposition of Louis J. Rauchenberger*

Q. What is the date of my letter to your office?

Mr. Medina: I will check the files. February 23.

A. I am quite sure we did not. I think the last meeting I personally attended was either in late November or early December. Up to that point we really thought the agency was going to continue in business and we fully expected them [70] to pull out of the hole. After that it seemed to be a much more substantial problem than that.

Mr. Medina: In reviewing the memoranda we have provided, is a written record of your attending the meeting on December 7, 1971.

Mr. Loflin: An appropriate occasion.

Q. I take it then, Mr. Rauchenberger, that your letter of February 23, 1972 was the first time that the demand had been made to Stokely-Van Camp directly to pay CBS the outstanding invoices. A. That is correct.

Mr. Loflin: Off the record.

(Discussion held off the record.)

Mr. Loflin: Back on the record.

I have no further questions today. I would like the opportunity to examine the witness further at some convenient time after we have gotten these documents.

Mr. Medina: Of course I can understand that, Mr. Loflin.

Mr. Loflin: We can get together and [70A] agree on some other time.

LOUIS J. RAUCHENBERGER

*Deposition of Louis J. Rauchenberger*

Subscribed and sworn to before me  
this 24th day of October, 1973.

MARTIN FRANK  
NOTARY PUBLIC, State of New York  
No. 31-6381008  
Qualified in New York County  
Commission Expires March 30, 1974

[71]

CERTIFICATE

STATE OF NEW YORK      }  
COUNTY OF NEW YORK      } ss

I, ASHLEY COLL, a Shorthand Reporter and Notary Public within  
and for the State of New York, do hereby certify:

That LOUIS J. RAUCHENBERGER, the witness whose deposition is  
hereinbefore set forth, was duly sworn by me and that such deposition  
is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to  
this action by blood or marriage, and that I am in no way interested  
in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day  
of August, 1973.

ASHLEY COLL  
ASHLEY COLL

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**Deposition of Louis W. Werle**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,

*Plaintiff,**—again —*

STOKELY-VAN CAMP, INC.,

*Defendant.*

72 CIV 1687

Deposition of witness LOUIS W. WERLE, taken by defendant pursuant to oral stipulation, at the offices of Columbia Broadcasting Systems, 51 West 52nd Street, New York, New York 10019, on August 15, 1973, at 10:20 a.m., before Frank W. Parker, a Shorthand Reporter and Notary Public of the State of New York.

## [2] APPEARANCES:

CRAVATH, SWAINE & MOORE, Esqs.,  
Attorneys for plaintiff,One Chase Manhattan Plaza  
New York, New York 10005BY: HAROLD R. MEDINA, JR., Esq.,  
RICHARD HIRSCH, Esq.,*of Counsel*LORD, DAY & LORD, Esqs.,  
Attorneys for defendant,25 Broadway  
New York, New York 10004BY: JOHN J. LOFLIN, Esq.,  
MISS MURIEL BELL, Esq.,*of Counsel*

## ALSO PRESENT:

CHRISTINE PHILPOT CLARK, Esq.,  
Attorney for CBS

*Deposition of Louis W. Werle*

\* \* \*

LOUIS W. WERLE, called as a witness, being first duly sworn by the Notary Public (Frank W. Parker), testified as follows:

*Examination by Mr. Loflin:*

Q. What is your name? A. Louis W. Werle.

Q. Where do you live? A. 50 Estrella Road, DeBary, Florida.

Q. Mr. Werle, are you presently employed? A. No.

Q. Are you retired? A. Retired.

Q. Prior to— A. I just retired in June. I was project manager of a mobile home park up until June and we sold it.

Q. And that was a concern down in Florida, was it? [4] A. Well, I was an investor in it, a group of investors and I was running it for them.

Q. Prior to that time, had you been employed by CBS the plaintiff in this lawsuit? A. Yes.

Q. For how many years did you work for C— A. Thirty-two years.

Mr. Loflin: Off the record.

(Discussion off the record.)

Q. Would you describe the various positions you held for CBS during your time with them? A. Well, I was always in the financial department and originally started as an administrative clerk in accounts payable, then became supervisor of accounts payable. Then payable manager of accounts payable, accounts receivable and credit and then was separated accounts payable and I remained credit manager of collections and credit and receivables.

Q. When did you become credit manager of collections? A. I would say about ten years ago.

Q. Did you— A. Before I retired.

Q. You held that position for the last ten years? [5] A. That's correct.

Q. And when did you retire from CBS? A. February, '72.

Q. Would you describe what your duties were as credit manager of collections? A. Well, if any new account came in, I got credit reports on them and make the decisions whether we wanted to take the account, on accounts we would make—we would get an accounts receivable run

*Deposition of Louis W. Werle*

every month and follow up on collections for that and we also posted accounts receivable.

Q. To whom did you report in the last, say, three to four years of your time with CBS? A. I would report to the—Farrel Bushing and before that it was Ted Bache and then prior to that Farrel Bushing.

Q. Well, say for the period 1969 until you retired, who was your superior at that time? A. Up until around '72 it was Ted Bache.

Q. What was his position? A. He was a director of accounting and accounts receivable and billing was under his supervision and prior to that it was Farrel Bushing who held the same job who reported to the controller.

[6] Q. Let's see if I have this right. You would report to Mr. Bache and Mr. Bache would report to the controller? A. That's right.

Q. Was that Mr. Rauchenberger? A. Right.

Q. I believe you said one of your duties was to check out proposed new accounts. What did you do to check out a new account? A. Get a Dun & Bradstreet report, check with other people who had done business with them.

Q. And this would be whom that you were checking out? A. Both the agency and the advertiser.

Q. So, just so I get the picture, if the ABC advertising agency comes to you and say I have the X corporation we would like to buy some time from you, you check both the agency and the sponsor? A. That's right.

Q. Do you ever recall making any credit checks [7] of that sort on Lennen & Newell or Stokely-Van Camp? A. Well, we had a list of approved agencies and sponsors and both of them were on that list.

Q. Who compiled that list? A. Well, before I took over there was an approved list and I would keep bringing it up-to-date, yearly.

Q. It was part of your function to add to the approved list? A. That's right, or delete from it.

Q. And did the list have on it both sponsors and advertising agencies? A. That's right.

Q. Were those lists kept separately or— A. Yes.

Q. How did one get on the approved list? A. I guess by past experiences, if they were brand new I would have to put them on. If they were on, I would continue them on through past experiences with them.

Q. Beginning in about 1969, would you tell us from that period until the time you left when any collection problems came to your attention that involved Lennen & Newell? [8] A. I don't know of any in '69. They were slow in part of '70 and then they caught up and became current again.

*Deposition of Louis W. Werle*

Q. Let's pause. Do you recall what time of the year in 1970 they were slow? A. I will look at these records.

(Checking documents.)

A. Looks like August and September schedule. They were about three months behind in paying.

Q. Well, if they were slow by August and September of 1970, what if anything did you do to get them up-to-date? A. I would start off by telephoning them and then if they were still slow we would try to arrange a meeting with them and have them present what information they could why they were slow and what they were doing to get back on a current basis.

Q. Who would you contact at Lennen & Newell? A. I would usually start off with Gill Muller who was the controller. And then usually wind up with Jack Speirs who was the executive vice-president of L & N and treasurer.

Q. Did you recall discussing Lennen & Newell's situation with either Mr. Muller or Mr. Speirs in [9] or about August, or September of 1970? A. It was probably later in the year than that because from—well, they went delinquent in the summer of 1970. It would be around October you would be starting to contact them and following up.

Q. Well, to the best of your recollection it would be sometime in the fall of 1970? A. Yep.

Q. And did your conversations with them take place over the phone or did you have personal meetings with them? A. Both ways.

Q. What explanation did they offer you as to the lateness of payment? A. As I can recall they were in a little cash bind at that time and they expected to be able to clear it up which the record shows they did.

Q. When you talked to them, was it with reference to all L & N accounts or any specific L & N? A. All L & N.

Q. Do you recall any specific reference to Stokely-Van Camp's account? A. Whenever I contacted them I would give them a list by sponsor. You go over Stokely, whoever they [10] owe, Reynold Metals, Florida Citrus, etc., and give them a breakdown of each advertisement and the total they owe.

Q. Was it your experience when they got slow with one account they tended to get slow with all of them? A. Yes.

Q. Did you understand why that was happening? A. Well, my best recollection is that they were just in a cash flow bind.

Q. Well, was it your conclusion that any of these late payments were due to the fact that the sponsors had not paid L & N? A. No.

*Deposition of Louis W. Werle*

Q. Was your understanding that sponsors were paying L & N but L & N was having a cash flow problem? A. Usually the agency would tell you they had not been paid by the sponsors if that was the case. If that wasn't the case that was their own policy.

Q. Did anyone at L & N ever tell you that Stokely was late in paying them? A. No, not to my recollection.

Q. So their explanation to you in the fall of 1970 was to in effect accept responsibility for lateness [11] in house? A. That's right.

Q. They were having the cash flow problem? A. Yes.

Q. So at what point did the payments by L & N to CBS get to the point where you found them acceptable after August and September of 1970? A. Well, they caught up by the end of the year or early January with everything, then the spring of 1971 they kept on a fairly current basis.

Q. By spring of '71? A. Uh-huh.

Q. Well, subsequently did they fall behind again? A. Well, the summer schedules they start falling behind for programs running during July and August in that period and they start falling behind again.

Q. Tell me this, Mr. Werle, your activities were on behalf of the network as distinguished from the—— A. Just the network.

Q. Was someone performing a similar operation for the organization? A. Mr. Schrager.

[12] Q. Did he contact different people than you contacted? A. Yes, he may have contacted different people in the agency than I did.

Q. He may have contacted different people? A. Possibly, yes.

Q. Do you think he also contacted Mr. Muller and Mr. Speirs? A. I think in this case, yes.

Q. Did you talk to Mr. Schrager about his problems during this period? A. Well, he would usually discuss his problems with me and I would tell him what I was doing about them.

Q. Well, returning for the moment to this collection problem of August, September, 1970, did Mr. Schrager advise you that payments for which he was responsible were also slow coming from L & N? A. Yes.

Q. Did you ever visit Mr. Muller, Mr. Speirs with Mr. Schrager? A. No. No, we never had any joint meetings with Morris Schrager.

Q. Did he ever advise you that his accounts [13] had also been brought up-to-date, that is the August, September, 1970? A. I believe he did, yes.

Q. Do you think that would also have been around the turn of the year? A. I couldn't tell you the time he may have been paid because he could have had different advertisers than we did.

*Deposition of Louis W. Werle*

Q. Do you know if he had— A. A lot of his could have been local advertisers where mine could have been national advertisers.

Q. Do you recall him advising you of any problem in delay in payment in the spring of 1971? A. Not directly, sometimes at the credit meetings he might discuss it with me.

Q. Now, are these internal CBS credit meetings? A. No, this is the New York Credit Group that those documents there are record of.

Q. You attended those on behalf of CBS and so did Mr. Schrager on behalf of the station? A. Yes, and there was a third member from CBS from radio.

A. Who was that? A. Dun Ducotey.

[14] Q. Spell the last name. A. D-u-c-o-t-e-y.

Mr. Medina: I think Mr. Loflin, the record should show at pages 54 and 5 of Mr. Rauchenberger's deposition you requested that we institute a search for the New York Credit reports. We had been unable to locate those and Mr. Werle found them yesterday afternoon and they are with us today.

The Witness: As you will notice on the list of members of it you will find Dun Ducotey's name down as a representative of CBS also.

Mr. Loflin: All right, I will review those subsequently and we will get into that and I do appreciate you producing them.

Mr. Medina: I am sorry for the delay but apparently the only person who knew where they were was Mr. Werle.

Mr. Loflin: Well, we are fortunate that he came back to town.

*By Mr. Loflin:*

[15] Q. Let's move forward in time, Mr. Werle, into the summer of 1971, did you have occasion to notice any change in the status of the Lennen & Newell account? A. Well, not in the summer to any extent because the programs were current. Probably starting in the fall we note—I really noticed that we weren't getting paid for July and August stuff.

Q. Now, in accordance with what—at least my understanding is that you would expect to be paid for July programs in August, is that correct? A. By the end of August.

Q. In other words, by the end of the month following the running of the commercial you would expect to receive payment? A. That's right.

Q. And you would consider that current? A. It would be current for the full following month.

*Deposition of Louis W. Werle*

Q. So would it be correct to say then that by the end of August it came to your attention that the monies you might expect from L & N for July programs had not been paid? A. That's right.

Q. And the same thing happened again the [16] following month, that is by the end of September? A. Yes, you wouldn't become aware of that actually until maybe September 10th because we wouldn't get the runs off accounts receivable until about that time.

Q. Did you have any particular instructions of what you were to do if the account was not current, that is it wasn't, the program costs were not paid by the end of the following month? A. Well, we usually gave a report to the controller where he discussed certain items on it.

Q. Were these accounts referred to as delinquent accounts at that point? A. That's right.

Q. When do you recall was the first time, say beginning in the summer of 1971 that you made such a report about L & N to Mr. Rauchenberger? A. Probably mid September or the latter part of September.

Q. Are those written reports? A. We used to make up a schedule each month that the assistant controller and the controller got.

Q. And that was one of the functions of your office? [17] A. That's right.

Q. They were prepared under your supervision? A. That's right. I didn't prepare them personally. I had a supervisor do that.

Q. But they were under your responsibility? A. That's right. They would go out under my signature.

Q. And they would go out under your signature for the use of Mr. Rauchenberger and his assistant? A. Yes.

Mr. Loflin: Do we have copies of such documents?

Mr. Medina: I am not aware that we have such but we will make another search for them. I thought that we had collected all documents which would bear on that Mr. Loflin. I am sorry for that. If they are in existence you shall have them.

Mr. Loflin: Can't always know what documents exist.

*By Mr. Loflin:*

Q. Would you say that in so far as some of your advertisers are concerned such a report would [18] have been a monthly affair? A. I don't quite follow—

Q. I will withdraw the question and put it this way. Without regard to who was listed on the report was this kind of report prepared every month of delinquent accounts? A. Yes.

*Deposition of Louis W. Werle*

Q. So Mr. Rauchenberger would expect to receive from you a delinquent status report every month? A. That's right.

Q. And I would assume in the line of what you testified sometime the Lennen & Newell accounts would appear on that, sometimes they would not? A. That's right.

Mr. Loflin: I would hope with that background we would be able to locate them which appears to be a monthly report of some sort.

Mr. Medina: We will institute a search.

*By Mr. Loflin:*

Q. Now, would it be your best recollection that the first of these reports coming forward from the summer of 1971 which would refer to Lennen & Newell [19] accounts would be forwarded to Mr. Rauchenberger in August or would it be September? A. Well, in August from the looks of the record there wouldn't have been delinquent. It only starts maybe past the—from zero to 30 in September. We used to break it down current zero to 30, 31 to 60, that type.

Q. So your best estimate would be it would be September before this type of report would go to Mr. Rauchenberger? A. They would show in the zero to 30 column and out of the current and nobody in the business gets too excited if somebody falls in the 0 to 30 column in this business occasionally.

Q. When does the excitement begin to arise? A. When it gets 60 to 90.

Q. When did that occur with Lennen & Newell? A. That would probably have been, I would guess it would be November before any part of their account got to that category, I mean without seeing the status reports.

Q. Did you have any discussions in the late summer or early fall with Mr. Rauchenberger about the L & N accounts? [20] A. I believe we might have, yes.

Q. Do you recall when the first of those discussions might have taken place? A. Might have been just a telephone conversation to them, you know.

Q. Could you tell us the substance of the telephone conversation? A. It was one of those things if some accounts start getting behind I would call Lou and say this one was behind or when he saw the status report he would call me and ask for an explanation.

Q. Would it be your job then to get in touch with the agency and try to get an explanation? A. Yes.

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Q. Did you do that in the fall of 1971? A. Yes.

Q. Who did you contact on that occasion? A. I would say probably both Gill Muller and Jack Speirs.

Q. Was there—was this a face-to-face meeting? A. Some were telephone conversations and I think I did have meetings with him, luncheon meetings.

Q. Were you the only CBS representative at these meetings? [21] A. On occasion, yes; on other occasions Mr. Rauchenberger may go along or Ted Bache or somebody like that.

Q. And what explanation did Mr. Speirs and Mr. Muller make for the status of their payments? A. I can't put it in any exact time—any particular meeting but around November they gave us an explanation that they were cutting costs and effecting a lot of savings and that by the year end they thought they would be in a position to clear up the whole thing again.

Q. Do you recall when this type of information was given to you by Muller or Speirs? A. I would say it would be latter part of October.

Q. Did you speak with any other officials at L & N? A. Lou Ames at that time.

Q. What was his position? A. He was sort of administrative vice-president.

Q. Was he also their lawyer? A. He was an attorney. I don't know whether he acted in a legal capacity for them or not but I remember he was an attorney.

[22] Q. Mr. Werle, I have information to the effect that there was a luncheon meeting on August 18th between you and Mr. Ames at a restaurant called the Stockyards. Does that refresh your recollection of any meetings you may have had with Mr. Ames? A. Lou Ames happened to be a personal friend besides somebody in Lennen & Newell. He used to work for CBS. I knew him quite well at CBS and at times other ex-employees of CBS we just have a luncheon and there may be very little business discussed. It was just a get together.

Q. Well, assuming that my information is correct for the moment, do you recall specifically anything that was discussed at a luncheon meeting on August 18th between you and Mr. Ames, August 18, 1971? A. I don't remember just having a private meeting with Lou Ames at the Stockyards. Usually if it was a restaurant like that you know there were other people in the luncheon.

Q. Well, do you recall a meeting on September 2nd with Ames and Speirs, Mr. Rauchenberger and yourself at Mercurio's across the street? A. It's hard to recall any specific date. We had a number of

*Deposition of Louis W. Werle*

luncheon meetings at Mercurio's because [23] I think that was one of Jack Speirs' favorite restaurants.

Q. Do you recall what the occasion was for you and Mr. Rauchenberger to meet with Mr. Ames and Mr. Speirs on September 2nd? A. Only recollection is might have just been discussing how are you getting along.

Q. Do you recall anything specifically that was said on that occasion? A. Might have asked him why we hadn't been paid for July at that time because July was past due on September 2nd.

Q. What was their response? A. No, they were always very optimistic at every meeting we had with them that things were going to turn around for them and they were effecting some savings and cutting back personnel and these things that I am sure it was one of optimism on their part, telling us that we just go along with them everything would be paid in a very short time. It was always usually of that nature.

Q. Were there other meetings after the August and September meetings with representatives of Lennen & Newell? [24] A. I believe there was but I didn't have any records of the date.

Q. Did there reach a point when you became alarmed in—to the point that you didn't share their optimism that they might get their account current by the end of the year? A. That would probably be the latter part of October or early November.

Q. Did you express your concern to anyone at CBS? A. Mr. Rauchenberger.

Q. Anyone else? A. I think I had discussions with Ken Hoehn, the treasurer at that time. Unfortunately he died in a plane crash.

Q. What was the substance of your report to Mr. Rauchenberger and Mr. Hoehn? A. That the account was past due now and in spite of promises that we were going to get paid nothing had come in and at that time there was a lot of news in the trade papers and the Times, you know, that they were trying to effect a merger and things of that nature.

Q. What did the proposed merger strike you as [25] a good idea or bad idea or what? I must say I don't understand the significance. A. Well, I got the idea that if they hoped to stay in business they would have to effect a merger and there was—they told us there were four different possibilities that might—merge with four different other agencies.

Q. Mr. Speirs told you that? A. Yes.

Q. Did he say these mergers were imminent, that they were right around the corner? A. He thought that one of them was going to definitely go through. I don't recall—I am sure he told us the names of some of the agents they were involved with but I don't recall who.

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Q. Was it Mr. Speirs' thought that in the event one of these mergers were successful Lennen & Newell's financial problem would be over? A. Yes, he gave us every indication it would be.

Q. Did he have any proposals, any alternative that is if the mergers did not go through? A. I think he felt so sure one of them would go through that he didn't mention any alternative.

Q. Did you suggest any course of action on [26] behalf of CBS to Mr. Rauchenberger or Mr. Hoehn? A. I really don't feel it was my place to recommend the course of action. I was looking for them to recommend the course of action.

Q. Well then, I take it you did not? A. I did not, no.

Q. Well, after you gave them a report which you told us you did do and you expressed your concern that the Lennen & Newell accounts were in arrears, did they set down some policy on behalf of CBS? A. I believe to my best recollection is that any new business would have to be paid on a current basis.

Q. Those were instructions given to you? A. Yes, and Lennen & Newell were quite agreeable to that type of policy.

Q. Well, thereafter did CBS accept some new business from Lennen & Newell? A. I believe Florida Citrus we accepted new business.

Q. Is it correct that Florida Citrus had adopted a practice of paying the network directly? A. Yes.

Q. Did they pay your stations directly also? [27] A. I believe they did. I think they paid everybody in the television radio media directly.

Q. Do you know of any other business from L & N accounts accounts after this current policy position? A. I don't recall. I would have to try to look up the record.

Q. Other than to advise representatives of L & N that any new business would have to be on a current basis did CBS take any steps to collect any money that was owed? A. We had meetings with them and they gave us new plans of what they were going to do to effect savings and most of their indications were they were going to show a profit in '72 and would give them a little time would be paid everything with a reasonable time.

Q. You reported on your meetings with L & N people back to Mr. Rauchenberger? A. Usually, yes. And I guess it was in November that Mr. Hoehn sent the corporate credit man to the meetings with us.

Q. Who was that? A. Allen Pabst.

Q. What action, if any, did Mr. Pabst take as a result [28] of attending these meetings? A. Well, he wrote up a detail report of everything transpired at the meeting and sent it to Mr. Hoehn.

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Q. During any of this period, that is from July '71 until the end of 1971, did anyone at CBS ever propose notifying the advertiser that their accounts were not up-to-date? A. Not to my knowledge, no.

Q. Did you personally ever contact Stokely-Van Camp? A. I never did.

Mr. Loflin: Off the record.

(Discussion off the record.)

Loflin: Back on the record.

Q. Mr. Werle, I am going to hand you a file that has been provided by your counsel, counsel for the plaintiff here, and I would like for you to take a minute or two and examine it so that you're familiar with the contents and I will ask you a few questions about it.

(Handing.)

Mr. Werle, is the file I handed you, I believe has a caption on a tab attached to it, New York Credit Group, is that correct? I am referring to the [29] blue tab on the manila binder. (Indicating.)

Mr. Medina: Right here.

Q. It's right there.

The Witness: It's on the folder too.

Yes.

Q. What is the New York Credit Group? A. The New York Credit Group is a group of credit managers and the New York Credit Group has a radio and TV broadcasting group which is a subsidiary of the New York Credit Group and the radio and TV broadcasting group only has members in the broadcast, radio and TV industry.

Q. Now that would include the television networks, is that correct?  
A. That's right, local stations.

Q. And local stations as well.

Did the credit group publish monthly reports concerning delinquent accounts? A. Yes.

Q. And does the file in front of you contain monthly reports? A. Yes. I don't know whether there is a report for each month. If I wasn't present at the meeting we [30] didn't get a report.

Q. These reports were physically distributed to those who attended the various meetings? A. Only to the members who attended the meeting.

Q. They didn't mail them to you? A. No, they were never mailed.

Q. These were monthly meetings? A. Monthly meetings.

Q. When you didn't go, did you send somebody else? A. No.

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Q. Did anyone else represent CBS at these meetings? A. Yes, Bob Schraeger from station division and Dun Duncote of the radio division.

Q. Ground rules the same as to those gentlemen. In other words, if they were present they would get copies of the same document? A. Of the exact same document. I might add that these documents were usually distributed for discussion at the meetings.

Q. But you do take them away with you obviously? A. Yes, you could take them with you to use as a reference file if you want to check some agency on past performances.

Q. Would you please look at the bottom paper [31] in that file and tell me what the first monthly report is that you see? A. January 19, 1971.

Q. January, 1971? A. Yes.

Q. Well, going forward from that point, do you recall any discussion at these meetings specifically dealing with Lennen & Newell either in January, '71 or any monthly meeting? A. I am looking at January, '71. I would say Lennen & Newell were probably not mentioned at that meeting because they don't appear on the list.

Q. Well— A. The way we used to handle these meetings were they distribute these to each member and we go down starting with A and go through the whole list and if any member had a problem with any of the agencies on there we would bring it up for discussion and other members used to participate, tell them what their problem was and how they were resolving it or what type of information they had and these—any information you gathered at these meetings was strictly for your own personal use and it was never acted on as a group. Each member made his own decision of what [32] he was going to do with any information he received at the meeting.

Q. Excuse me just one minute.

(Discussion off the record.)

Mr. Medina: Off the record.

(Discussion off the record.)

Mr. Loflin: Back on the record.

*By Mr. Loflin:*

Q. Mr. Werle, since you have said that the January report does not refer to Lennen & Newell and you would not expect any discussion to have occurred. If Lennen & Newell is referred to as I believe it is in some of these other reports, is it your recollection then that discus-

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sions were held? A. As I mentioned before we just would list alphabetically. Somebody would maybe notice Lennen and Newell three or four times and somebody would say, "How about Lennen and Newell" and would say, "Oh just slow payers."

M. Loflin: All right, we will resume.

Q. Would the file in front of you, Mr. Werle, that you have been referring to refer to the documents received from the credit group in the year 1971? [33] A. I don't follow your question.

Q. Well, is this the New York Credit Group file for the calendar year 1971? A. As I say there may be some months missing but they would be the file I have for the New York Credit Group.

Q. And was this maintained in your office? A. Yes.

Q. I show you what appears to be a similar file and I ask you if this is the New York Credit Group file for the year 1970? (Handing). A. Yes, this is the file for 1970.

Q. What is it?

Mr. Loflin: What is the least complicated way of marking these?

Mr. Medina: Why don't we deem both files marked as Exhibit NN and I will undertake to put them in one place arranged chronologically and deleting certain of the material in here which is obviously irrelevant to our case which I will do in consultation with you.

Mr. Loflin: That is fine. The files will be marked collectively Exhibit [34] NN covering the New York Credit Group files for the year 1970 and '71.

(New York Credit Group files for the years 1970, '71, marked joint Exhibit NN for identification as of this date.)

(Deemed so marked.)

Mr. Loflin: Let's go back on the record.

*By Mr. Loflin:*

Q. Did Mr. Rauchenberger ever express any opinion to you about whether or not Lennen & Newell was going to survive financially in the fall of 1971? A. Only as late as the last week of December after we had some long very informal meetings with him that he thought they might not survive.

Q. That was his opinion he expressed it to you? A. (Nods.)

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Q. Prior to that time did he ever discuss any way or the other about Lennen & Newell? A. Well, he thought for a while they were going to make it.

Q. But his opinion changed about the end of November, early December? A. That's right.

[35] Q. Well, did you express any opinion to Mr. Rauchenberger at any time in the fall of 1971 about the future prospects of Lennen & Newell? A. Probably in the September early October period I had every hope, I really believed they were going to come through.

Q. In substance you told Mr. Rauchenberger that? He seemed to agree with you? A. At that time.

Q. As we move on into the fall of 1971, did Lennen & Newell have occasion to call some of its creditors in for a group meeting? A. It was late in '71, probably in November, early December.

Q. Did you attend on behalf of CBS? A. Some I did yes, some Mr. Rauchenberger attended alone.

Q. Well, as to the ones where you had attended, were representatives of the other networks present? A. I know one where NBC had a representative and ABC had a representative.

Q. Do you know the names of those gentlemen? A. I believe it was Dick Rayburn the treasurer of NBC and John Murray the credit manager of ABC.

[36] Q. Mr. Murray's job similar to yours, to your knowledge? A. Except for the fact he collects for whole network instead of mine was strictly network, television network. He collected for the stations and the network. His was, I would say a combined job of Schrager's and mine.

Q. What was the proposal if any made by Lennen & Newell to its creditors when they had them assembled in a group? A. I believe the first one was that if we went along with them they had—with their forecast for 1972 they hope to have the whole past due balance cleared up within the year.

Q. That would be the calendar year '72? A. '72, yes, this was in the fall of '71.

Q. Right.

That was their proposal? A. That was.

Q. Did you forego taking any action against them? A. That was one of their original proposals in the early part.

Q. The creditors were asked to forego taking [37] any action is that the other side of the coin? A. Yes, they felt if the creditors took any action they would start losing their clients, the advertisers.

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Q. Do you agree with that? A. I think they would if the creditors start taking action against them. That was one of our reasons we didn't want to take any direct action, any of the networks because we didn't want to jeopardize their chances in surviving.

Q. So based on your experience as a credit man you felt that if you moved directly against Lennen & Newell it would cost them their accounts, their clients would look elsewhere? A. Right. I could tell you former experiences with agencies we went along with the agency and the agency came through with flying colors so we did.

Q. Where the client was not advised of what was going on it all worked out? A. Well, we didn't contact the client and we didn't take any action against the agencies, we just went along with the agency and extended a little more time and they came through and I guess one of the five top agencies right now.

[38] Q. And initially is it fair to say that you hoped this was the way this would work out also? A. We had every expectation it would come out that way.

Q. As I understand your testimony you say this was the first proposal that Lennen & Newell made that is if the creditors would forego any action they would hope to become current by the end of 1972? A. That's correct.

Q. Will you tell me what response the creditors made to that proposal? A. Being it was the three networks who were the largest creditors and we all agreed to go along with it it gave them a lot of new hope.

Q. How long did that status remain? A. Probably no more than a month.

Q. Now, where are we in time after the lapse of about a month? A. I would say the middle of December.

Q. December '71? A. (Nods).

Q. What happened then? A. Then they came up with new proposals.

Q. Would you outline those please? [39] A. Gee, I would have to look them up. I don't recall them offhand.

Q. It was something different from their original proposal, I take it? A. Yes, extend them more time.

Q. Did you conclude or did they tell you in the intervening 30 days their situation had gotten worse rather than better? A. Well, they told us on business from November first on they were on a current basis it was just the past due that they were concerned about.

Q. What was the reason from turning away from the original proposal? A. I think by that time they had a new president come in,

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Lyddan, and he was going to make a clean sweep and cut costs terribly and I guess they didn't see their way clear to be able to clean it up as fast as they expected to.

Q. Who had the prior proposal before clearing it up by the end of 1972? A. Jack Speirs and Don Campbell.

Q. Don Campbell—— A. I believe he was over Jack Speirs but he wasn't the president.

[40] Q. Do you know his first name? A. No, I don't.

Q. Did Mr. Adolf Tiigo ever address the creditors? A. No.

Q. Did he attend these meetings? A. I think I saw him once walking through the office and somebody identified him, that was the only knowledge I had of him.

Q. Do you know what his position was at Lennen & Newell in the fall of 1971? A. I believe he was chairman of the board and the largest stockholder.

Q. Was the new proposal to creditors made sometime in mid-December '71 accepted by the creditors or what happened? A. My recollection is we didn't turn it down.

Q. Well, did the creditors agree to go along with it? A. In effect, yes.

Q. How long did that situation last? A. I guess until about January when—I am not sure of the days but then there was a creditors' committee formed. In the beginning it was just group meetings without any formal committee but then a formal [41] creditors' committee was formed.

Q. As nearly as you can would you say that was in early 1972 or late 1971 or what? A. It could be the last week of December or early January. Because you got to realize I have been away from this for a year and a half so I didn't have much time to prepare for these things.

Q. Did CBS participate in some of the creditor meetings? A. Yes.

Q. Did you personally? A. Yes, I went.

Q. Will you describe what occurred at the first meeting you went to? A. I believe Dick Rayburn or—they wanted me there to be the chairman or co-chairman and I wouldn't accept it. I think Dick Rayburn became the chairman or John Murray and the vice, I don't know who was the chairman or co-chairman.

Q. Did you make the decision not to accept that position or did the network instruct you not to do it? A. Well, I made the decision because I knew I was going to retire in a month. I didn't think it would be fair.

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[42] Q. So either Rayburn or Murray became the chairman of it?  
A. Well, they were chairman and co-chairman, which I don't recall.

Q. What happened at the meeting of the creditors? A. I believe the committee selected an attorney to represent the creditors' committee.

Q. Do you recall who that was? A. No, I don't. He was supposed to have been well known in that type of case though.

Q. I have seen references to an attorney named Allen Arrow, does that sound correct to you? A. There was an attorney there by the name of Arrow but I—I didn't think it was the one representing our committee.

I think Allen Pabst may have notes on these things. I thought Allen represented Lennen & Newell, they brought in outside counsel.

Q. He may have I am not certain. A. I know I recall the name of Arrow but I am not sure exactly what his status was.

Q. Was—does the name Leonard Schwartz mean anything to you as far as attorneys were concerned in relation to this credit group? [43]

[43] A. I imagine he was the attorney for the credit group.

Q. Mr. Werle, I show you a memorandum— A. Leonard Schwartz was elected counsel of the committee, that's right.

Q. Thank you.

Now, what happened at the committee meetings other than the selection of counsel? A. Well, Lennen & Newell promised they would come up with financial statements and give a complete record of what—who—what the creditors were in categories and I believe we had to wait a couple of weeks to get that information from them.

And then they came up with a new proposal at each meeting for the creditors' approval.

Q. Now, you say each meeting. Are we now into January, '72, would you say? A. I see here from Allen Pabst's note an informal creditors' meeting was held as early as December 14th.

Mr. Medina: You are referring to the memorandum of December 14th which refers in turn to yesterday's meeting so that would be the meeting of December 13th.

[44] The Witness: Yes.

Mr. Medina: Mr. Werle has before Mr. Loflin the memorandum of which I have previously given you copies.

Mr. Loflin: Right.

*By Mr. Loflin:*

Q. Mr. Werle? A. Yes.

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Q. Let's refer to this memorandum of December 14th for a moment. A. Yes.

Q. In paragraph 3, in paragraph 3, Mr. Pabst's note since the first creditors' meeting of November 23rd, L & N had not paid any bills incurred prior to October 31st? A. Yes. Well, there was a freeze put on payment of any bills prior to October 31st because they promised they would keep on a current basis on any business they gave out after November 1st.

Q. So this paragraph would mean to you that Lennen & Newell were making an effort from November 1st forward to be current? A. To be strictly on a current basis.

Q. But was in effect ignoring all past due? [45] A. Well, they weren't ignoring they were presenting plans of how they would pay this debt off.

Q. Well, ignoring in the sense they wouldn't make any payments on it? A. Yes.

Q. I understand they had these proposals but whatever monies they were spending on their debts were debts incurred after November 1, 1971 during this period. If they were making any payments on their debts it was for current billings? A. Current billings from November 1st on.

Q. How long did CBS go along with these various proposals in the sense of not taking any action against Lennen & Newell? A. I know Allen Pabst has a record of it here someplace where I resigned from the credit committee at the same time ABC and NBC did.

(Discussion off the record.)

The Witness: I resigned from the committee on January 27th.

Q. How was—why was that decision made? A. Well, I felt if I served on it any longer it might jeopardize our position against network sponsors.

Q. You say the other networks resigned on the [46] same day? A. I believe they did, yes, John Murray and Dick Rayburn. I might mention to you we were the only three network representatives on the committee. The other—rest of the committee were production people, local stations and people of that nature.

There was a lot of production people, newspapers, magazines and everything and they were all represented on the creditors' committee.

Q. Well, during these various discussions in 1970 and more particularly in 1971, was it your understanding, Mr. Werle, that L & N's clients had paid them but they just simply had not turned over the money to CBS? A. I would have to say yes.

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Q. And that included Stokely-Van Camp? A. They never made any—gave us any indication that they hadn't been paid by their client.

Q. Isn't it correct that on occasion spokesmen from L & N put it more positively than that to the effect that the client including Stokely had paid them but they were having some internal difficulty? A. I would say yes.

Mr. Loflin: Could I confer with [47] Miss Bell for just a minute?

Mr. Medina: Yes.

(Discussion off the record.)

Mr. Loflin: I don't have any further questions for Mr. Werle so we can go off record.

(Discussion off the record.)

*Examination by Mr. Medina:*

Q. Mr. Werle, in the discussion that you had in October and November and December with representatives of L & N, did they tell you anything as to what communications, if any, they had had with their advertisers concerning their position? A. Well, I was led to believe that their advertisers knew of their financial condition.

Q. Who told you this? A. Whether it was Lou Ames or Jack Speirs, I am not sure. It was at a general luncheon meeting.

Q. These reports that are shown in Exhibit NN, these two folders. A. Yes.

Q. Were reports given as to all advertising agencies? [48] A. No, there was an excludable list of the top 20, 25 agencies.

Q. And was L & N on that list? A. They were on that list, yes.

Q. What function did these reports that are shown in Exhibit NN serve? A. Strictly for informational purposes. If any agency that was running consistently late then it would be a matter of discussion at the meeting and each one would give his, the information he had about the agencies and the contacts he had made and the stories he had received, because any information you got from this meeting was strictly for your own private use and your own private decision.

Q. I understand that, but I just wanted to see what the function of those reports were, were they meaningful? A. Well, if the information was that somebody was putting in a new computer system, they were running a month or two behind it was understandable that way.

I personally didn't take that much faith in them because if you notice there are an awful lot of small agencies that are listed here and

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the people in the station divisions, in the local stations were [49] more interested than I was.

Q. Now, you mentioned that you had an approved list internally?  
A. Yes.

Q. On whose credit did you rely? A. Well, an approved list showed that the advertisers and the rating I gave them as to top dollars I would allow and the agency.

Q. Did you rely on the advertisers credit or the agent's credit? A. Strictly the advertiser. If a national advertiser like U.S. Steel came through a small agency we would still extend them the same credit as we would through the top agency.

Q. I have a group of memoranda which I have produced and given to Mr. Loflin, starting with one of November 9, 1971 and ending with one of February 15, 1972, copies of which I have given you.

Did those memoranda correctly reflect what took place at the meetings shown thereon? I know you had the opportunity of reviewing them. A. I read these yesterday afternoon, last night and I would say yes they represent everything, according to my recollection.

[50] Mr. Medina: May we deem those memoranda marked as Exhibit 00, or would you prefer that we mark them individually, Mr. Loflin?

Mr. Loflin: I have no objection to marking them collectively. I must say, Mr. Medina, that to the extent these memoranda purport to reflect what went on at meetings where Mr. Werle was not in attendance, I don't see how he could characterize them.

Mr. Medina: Of course. I was only trying to short cut.

The Witness: This is off the record.

(Discussion off the record.)

*By Mr. Medina:*

Q. At the time you were having discussions in the fall of 1971 with respect to L & N, its position, were there other discussions going on between you and others of the credit people at CBS concerning other agencies? A. There were usually always some agencies that were slow that we had discussions about.

Q. Was it a common occurrence or uncommon [51] occurrence for an agency to be 30 or 60 days late? A. I would say generally it was uncommon because you would find an agency for a period going over

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being late and then catch up, maybe another agency would fall in that category and then catch right up.

Mr. Medina: That is all I have, Mr. Loflin.

Mr. Loflin: Well, I have a few more questions.

*Examination by Mr. Loflin:*

Q. In response to Mr. Medina's questions you referred to a luncheon meeting with Mr. Ames and Mr. Speirs which one of them said something about whether their advertisers knew or did not know about their financial condition. Could you pin that luncheon meeting down in time? A. I could only put it in a time frame, not an actual date. It would probably be September—middle of September to early October period.

Q. Now, can you be more specific as to whether it was Mr. Ames or Mr. Speirs who referred to the knowledge of the advertisers concerning Lennen & Newell's financial condition? [52] A. If I had to pick one of the two I would say it was Mr. Speirs. Because Mr. Speirs was always closer to the situation than Lou Ames would be.

Q. Did Mr. Speirs tell you that Lennen & Newell had told its own advertisers that while you have paid us the amount of our invoices to you, we have used the money for other matters and have not paid the bills owed for your advertising on the various networks? A. I don't think they put it in that exact language. They just more or less let us know that their advertisers were familiar with their financial condition.

Q. Based upon your experience in this business, Mr. Werle, wouldn't you expect an advertiser who knew he had been paying his agency, if he knew that his money in effect was being diverted and his bills for advertising were not being paid he wouldn't stay very long with that agency? A. In most cases I would say that would be true but I have known cases where the advertiser knew that money wasn't paid and they went along with the agency.

Q. But Mr. Speirs did not spell this out to you at any rate that they had told all their advertisers that they were taking their money and using it for Lennen & Newell's business but not— [53] A. As I said before he didn't put it in that language but he let us know that his advertisers were familiar with their financial problems.

Q. Did he say anything specifically regarding Stokely-Van Camp's knowledge? A. No.

Q. Just in general that— A. Their advertisers were aware of their problems. And when he was talking to the network people it was

*Deposition of Louis W. Werle*

only really three big or at that time two because Florida Citrus was paying direct so it would be Reynolds Metals and Stokely-Van Camp.

Q. In your earlier testimony you said it was important for the creditors not to sue Lennen & Newell or bring any action against them because the advertisers would then immediately leave the agency, now that was your testimony, wasn't it? A. Yes.

Q. So doesn't it follow from that that if the advertisers understand that the network bills for their advertising are not being paid and in effect their monies being diverted to its uses that they would leave the agency? A. Not necessarily. A lawsuit that had publicity [54] may be the thing that would make the advertiser decide to leave the agency but if things were being worked out they would go along with it.

Q. But in any event, you never told Stokely that the charges for its advertising were not being paid by Lennen & Newell? A. No, it wasn't a custom in our business to contact the advertiser. If the advertiser wanted to call us and ask us whether we paid we would give them the information we had but it was very seldom done in the industry where you would call the advertiser and tell them you hadn't been paid.

Q. That was not your custom? A. It was not our custom and I don't think it was the custom in the whole industry.

Q. But are you saying also it is none the less your cus—it's your custom if an agency don't pay then to go the advertiser and demand payment? A. If all other methods have failed, yes.

Mr. Loflin: I have no further questions.

Mr. Medina: That is all.

(Time noted: 12:15 p.m.)

[54A] LOUIS W. WERLE, MADELINE MCQUILLA  
 Notary Public, State of Florida at Large, My Commission Expires  
 Jan. 12, 1975, bonded through Fred W. Diestrom.  
 Subscribed and sworn to before me this 9th day of October, 1973.

[55]

## CERTIFICATE

STATE OF NEW YORK } ss.:  
 COUNTY OF NEW YORK }

I, FRANK W. PARKER, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That LOUIS W. WERLE, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

*Deposition of Louis W. Werle*

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of September 1973.

FRANK W. PARKER

[56] August 15, 1973

*Deposition of Louis W. Werle***INDEX****WITNESS**

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**EXHIBITS**

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NN	New York Credit Group files for the years 1970, 1971. 34

**Deposition of Marvin Schrager**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,  
—against—  
STOKELY-VAN CAMP, INC.,  
72 CIV 1687  
Plaintiff,  
Defendant.

Deposition of witness MARVIN SCHRAGER taken by defendant pursuant to subpoena at the offices of Columbia Broadcasting Systems, 51 West 52nd Street, New York, New York 10019, on August 16, 1973, at 10:00 a.m., before Frank W. Parker, a Shorthand Reporter and Notary Public of the State of New York.

[2] *Appearances:*

CRAVATH, SWAINE & MOORE, Esqs.,  
Attorneys for plaintiff,  
One Chase Manhattan Plaza,  
New York, New York 10005

By: HAROLD R. MEDINA, Jr., Esq.,  
RICHARD HIRSCH, Esq.,  
Of Counsel

LORD, DAY & LORD, Esqs.,  
Attorneys for defendant,  
25 Broadway,  
New York, New York 10004

By: JOHN J. LOFLIN, Esq.,  
MISS MURIEL BELL, Esq.,  
Of Counsel

*Also Present:*

CHRISTINE PHILPOT CLARK, Esq.,  
Attorney for CBS

*Deposition of Marvin Schrager*

\* \* \*

[3] MARVIN SCHRAGER, called as witness by the defendant, being first duly sworn by the Notary Public (Frank W. Parker), and stating his residence as 760 East 10th Street, Brooklyn, New York, testified as follows:

Mr. Medina: May the record show that the witness is appearing pursuant to subpoena. I will give you the original and the affidavit of service to be annexed to the original deposition. This is at the witness' request.

By Mr. Loflin:

Q. Mr. Schrager, by whom are you employed? A. John Blair & Company.

Q. What is the business of Blair & Company? A. They are a radio and TV station representative.

Q. How long have you been employed with Blair? A. Since November of 1972.

Q. Prior to that time by whom were you employed? A. CBS, TV stations division.

Q. How long were you employed by the CBS, TV stations division? A. About three and a half years.

Q. That would mean you started— A. 1969.

[4] Q. —started in 1969? A. Right.

Q. Prior to that time by whom were you employed? A. Prior to that I was with—where was I? Schenley Industries.

Q. When you first came to CBS, TV stations division, what was your capacity? A. I was credit manager.

Q. Credit manager? A. Correct.

Q. And did you continue in that capacity until you left in November of 1972? A. Yes, I did.

Q. Would you describe, please, the functions and duties of the credit managers of the stations division? A. Okay, primarily the functions were approval of credit on any new advertising agencies which may have come into existence and the follow-up for collections of any outstanding billings for the CBS five owned TV stations.

Q. I take it then your responsibilities were not limited to the TV stations owned by CBS New York but included all five stations wherever they are located? A. That is right.

Q. To whom did you report as credit manager? [5] A. I reported to the director of accounting.

*Deposition of Marvin Schrager*

Q. Who was that? A. Well, it changed several times during three years or so that I was there. When I started there it was Ted Curran, actually he was the assistant controller.

After that it became Arnold Weinstein who was director of accounting and then Dennis Veccia. He was also director of accounting.

Q. To whom did the director of accounting report? A. He reports to the controller of the division.

Q. And who was that person? A. Under Dennis Veccia it was Maurice Reid who was still the controller, Arnold Weinstein reported to Ted Curran for a while—no, I am sorry, he did not. It was Reed and before him Charles Cadlac, Ted Curran reported to a gentleman who is no longer with CBS, he is retired. I can't think of his name offhand.

Q. Well then as I understand it in the hierarchy the credit manager reports to the director of accounting who reports to the controller, the actual name of the occupant. A. Usually. There was a short period of time where I reported directly to the controller.

Q. Now, directing your attention to the period [6] 1970 and 1971, do you recall any time during 1970 when there was a credit problem of any sort involving Lennen and Newell? A. Yes, I do.

Q. Would you describe that, please? A. Well, Lennen and Newell of course had been one of the largest agencies in the country, billings, CBS billings to them were always very high and up until the period that I just mentioned they were regarded as a very strong advertising agency, one who paid their bills very promptly.

Somewhere during that period we noticed the slowness in their payments where they would normally pay in 30 days, I guess first they slowed to 60, eventually to 90 and even over 90.

Q. Did you have some sort of monitoring operation as credit manager to carry and "on account"? A. Yes, we followed up accounts every month by sending a statement number one and if necessary a letter to the agency.

Q. If your stations carried advertising placed through Lennen and Newell say in the month of January of any year, when would you expect payment if payment was going to be made currently? [9] A. January invoice would go out at that time approximately the 15th of February, maybe a little later than that, between the 15th and the 25th, let's say, of February and we would expect payment really a month after that or by March, let's say, by the end of March for an agency to be current.

Q. Well, in general, then, was it 30 days after the invoice date? A. Right, 30 days—not date of, after receipt of invoice.

Q. Well, was the mailing date and the invoice date different? A. Yes, they were different. The January invoice that you just described

*Deposition of Marvin Schrager*

would have of course a January 31st date on it, but it wouldn't go out until as I said February 15th or 22nd.

Q. If it went out on the 15th of a given month you would hope to be paid before the 15th. A. By the 15th of the following month.

Q. Following month? A. Correct.

Q. If it is not in your capacity as credit manager, was this matter brought to your attention? A. Well, it was brought to my attention by trial balances that I received every month from the accounting [10] department on the accounts receivables area.

Q. Well, limiting ourselves for present purposes to the calendar year 1970, do you recall any difficulties with Lennen and Newell in that calendar year? A. It is really hard for me to recall exactly when they ran into difficulty but it was somewhere I think late 1970 or early 1971, maybe even 1971, 1972, I am not really sure.

Q. Well— A. I think it was 1971, I think. We first had noticed that they were slowing down.

Q. Obviously I have no personal knowledge of this situation but I would tell you that other witnesses have said there were problems during 1971 which were subsequently cleared up but then in 1971 there was what I would call a slide, from which Lennen and Newell did not recover.

I am not trying to tell you what you remember but I do mention to you that if this helps you recall—

Mr. Medina: I think you misspoke yourself. There was trouble in 1970 and a slide later on in 1971. I think you—

Mr. Loflin: Mr. Medina is correct. There was a problem in 1970 according to other [11] witness' testimony which was corrected to his satisfaction and then again in 1971 and more particularly again in the summer and going on into the fall of 1971 there was a kind of ultimate problem culminating eventually in Lennen and Newell's bankruptcy.

Now, your recollection is your own affair and I am not trying to tell you what to say but— A. Right, what you say seems correct.

Q. Well, do you recall in 1970, and we will stay with this calendar year for a moment, having any discussions of Lennen and Newell's accounts or arrearage in accounts with anyone at Lennen & Newell? A. Well, I would call all the agencies monthly, especially one the size of Lennen and Newell since the bills as I stated before to CBS was always high, it was the practice in our division to call the major agencies once

*Deposition of Marvin Schrager*

a month usually on the last day of the month to try and get as much money into the house as possible before the close of that billing or that monthly period. So I would say that I did call Lennen and Newell monthly throughout 1970 and 1971.

Of course, near the end there was no point in calling, you know, I just new that there wasn't any money [12] there but in 1970 when I did call I believe I usually did get a check. Maybe not as large as I hoped for but—

Q. Again staying with 1970 for a moment. A. Right.

Q. When you say you would call, to whom did you call? A. I think there was somebody there by the name of Kelly, if I am not mistaken, at that time. No?

Q. I can't say no. A. I know he was there at sometime whether it was 1970 or arrived—there was a person at Lennen and Newell who was in charge of paying the bills.

Q. We hear the name of Gill Muller and Jack Speirs mentioned. A. Speirs, all right. At that time in 1970 I don't think the situation was bad enough for me to have to go that high. I was still dealing with somebody on the lower level who was able to get me a check.

Q. Would Mr. Kelly be a subordinate to Mr. Muller or Mr. Speirs? A. Right.

Q. Do you know Mr. Muller I believe was described as the controller? A. Controller, right.

[13] Q. And was there Kelly in his office? A. Right, he was probably the accounts payable manager or something of that nature.

Q. You found in 1970 if you called Mr. Kelly and complained something would be done to bring the account up to date? A. Maybe not up to date but there was some payment made.

Q. A check would come? A. Right.

Q. Did Mr. Kelly or anyone else at Lennen and Newell ever offer you any explanation as to why they kept running behind in their account? A. Usually we got the—I can't remember exactly what his explanation was but dealing with so many agencies you get explanations like we did not receive the money from the client yet or somebody is out sick. Many excuses are rendered.

Q. Do you recall specifically what Mr. Kelly said? A. I really don't, not back in 1970.

Q. All right, well then let's move forward.

I take it in 1971 you were still credit manager and still responsible for supervising these delinquent accounts and making an effort to collect them for the [14] company. A. Right.

*Deposition of Marvin Schrager*

Q. What do you recall about your—about the status of the Lennen and Newell account in 1971? A. In 1971 I guess it started to get worse.

Q. What efforts did you make to correct? A. Well, of course when I got no satisfaction from Kelly or whoever I was dealing with on his level, we then went a little higher, probably to Muller or Jack Speirs and then again I think early in 1971 we did get some satisfaction, some checks came in. Exactly where in the year, we actually found out that they were in serious financial difficulty, I really don't remember when it was. But up until a point we were getting some money from them.

Q. Do you recall the names of the advertisers whose advertising were placed through Lennen and Newell on your station? A. It was Lorillard, Stokely-Van Camp, offhand I don't really remember the others.

Q. Well, how about Reynolds Metals or the Florida Citrus Commission? A. Yes. Florida Citrus we had not too much of that but I think—that was a network account mostly, I think [15] they ordered some spots, not too much.

Q. Did you have some for Reynolds Metals? A. Yes, I think we did. Again not too much. Major accounts with the TV station division I believe was Stokely and Lorillard up until the time the TV advertising went off the air.

Q. Do you know Mr. Louis Werle? A. Yes, I do.

Q. Of—did he have a position similar to yourself in behalf of the network? A. Yes, he did.

Q. During 1970 and 1971, did you have occasion to compare notes with Mr. Werle? A. Oh, definitely. As I said before I don't remember exactly when the situation really got bad what month but of course when it did get bad then I would speak to Lou about it a lot. Lou was more involved with Lennen and Newell than I was in respect—had a closer relationship with Jack Speirs I think and Muller, since the network dollars were larger and he had been around a long time and, you know, was more involved with them.

Q. Did you ever meet face to face with Kelly or Muller or Speirs to discuss their credit situation? A. At a certain point we did.

[16] Q. Do you know when that was? A. Again I couldn't give you the exact date but I remember several meetings with Speirs and Muller and Lou Werle, myself. I think they were held in the network controller's office. Louis Rauchenberger.

Q. Well, would those have been in 1971, do you think? A. When did they actually go out of business, 1972?

Mr. Medina: February, 1972.

*Deposition of Marvin Schrager*

A. Yes, well then it was late 1971, I would say in September, August or September.

Q. Well, do you recall anyone on behalf of Lennen and Newell offering any explanation of their problems? A. Well, when we actually got to these meetings I think they actually came out and told us that they, you know, had misused money or, you know, trying to think of the reasons they gave.

Q. You say misused money? A. Well, I don't know—yes, the money that had come in from the advertisers, it evidently wasn't passed on to us so they had done something else with us. They blamed it on poor subsidiary operations, I think, overseas operations which did not work out. They had bought another advertising agency, I think, which did not produce what [17] it should have.

Q. Is it fair to say that they did not place the blame on the advertiser for the problem? A. Oh, that is true.

Q. Is it also fair to say that they indicated that the advertisers had paid but their own internal problems had caused the difficulty? A. Right, that is correct.

Q. What, if anything, did they propose to do about the situation in the future? A. At that point they claimed they would clean house so to speak and cut their expenses to the bare minimum. They claimed they were going to sell some of these foreign subsidiaries, offices in other cities in this country tighten ship and they also told us that all the advertisers had assured them that they would stay with them and that they thought within X number of months or years they could pay us what they owed us and stay current on whatever business they were currently giving us.

Q. What did you or the other spokesmen of CBS respond? A. Well, in light of our long relationship with Lennen and Newell, we did not want to force them out of business and we tried to go along with them.

[18] Q. Did you or anyone else at CBS propose that the advertisers be contacted directly to apprise them of the situation? A. I believe that that was brought up, actually I think when they came to us or when these meetings were held the advertisers they told us had already been informed of the situation.

Q. Now, when you say been informed of the situation, did they tell you they had told their advertisers they had taken in all the monies the advertisers had paid them and used it for other purposes? A. Exactly what they told their advertisers, I don't think they told us in those words but I believe they told us that the adve: made aware that they were delinquent in paying the bills to the media and that they were going to try to resolve the situation.

*Deposition of Marvin Schrager*

Q. Do you recall them saying anything like that specifically involving Stokely-Van Camp? A. I really don't know. I can't say I do.

Q. Did you personally or anyone at CBS to your knowledge have any direct dealings with Stokely-Van Camp concerning the status of its accounts in your division or any other CBS division? A. Again, I don't know exactly when but I do believe [19] that a letter was sent from our legal department to all the advertisers involved at one point.

Q. Ultimately that is correct but I believe Mr. Medina and I agreed that was sometime in 1972.

Mr. Medina: That is correct.

Q. But let us speak in terms of 1970 or 1971 when you were dealing with representatives of Lennen and Newell because the account was delinquent.

To your knowledge, did anyone at CBS contact anyone at Stokely? A. I know that I did not. I don't know if the network might have or not.

Q. Did anyone at the network propose in your presence that the advertisers be contacted directly concerning their delinquent accounts or the accounts that came to you through Lennen and Newell? A. I really don't recall. I don't remember that being brought up.

Q. Was it the policy of your division to deal with the advertisers directly when the accounts were in arrears? A. Not really, well—no. Not when an account was in arrears.

Q. Your practice then, I take it, was to deal with the advertising agencies about those problems? [20] A. Right, we were always paid by the agencies and we dealt always directly with the agencies.

Q. Did you remain as credit manager until November of 1972? A. November of 1972, right.

Mr. Loflin: I would like to confer with my colleague for a minute.

Mr. Medina: Certainly.

(Discussion off the record.)

*By Mr. Loflin:*

Q. Mr. Schrager, are you familiar with an organization known as the New York Credit Group Service, Inc.? A. Yes, I am.

Q. Did you attend any meetings under the auspices of that group? A. Yes, I did.

Q. Does that group publish reports from time to time? A. They publish monthly reports listing accounts that are delinquent.

*Deposition of Marvin Schrager*

Q. And did you have occasion to review those reports? A. Yes, I did.

Q. I show you two folders which were deemed marked.

Mr. Medina: NN.

[21] Q. Exhibit NN for identification and I ask you if you recognize these as the New York Credit Group reports and files for the years 1970 and 1971. (Handing.) A. They look like those reports; right.

Q. And did you—you attended meetings at which these reports were distributed, is that correct? A. Right.

Q. Did Mr. Werle also attend those meetings? A. Yes, he did.

Q. Anyone else from CBS? A. Don Decotte who was the radio credit manager and probably other people from time to time.

Q. Do you recall at any of these meetings any discussions specifically about Lennen and Newell? A. I really don't but I am sure that Lennen and Newell being delinquent in payment during that period of time was brought up just as any other agencies that was delinquent would have been. Our policy at the meetings at that time was to discuss as many agencies on the list as we could. By discuss, I mean going around the room and anybody who knew of the reason for delinquency or knew anything pertinent about the agency would bring it up to the group.

Q. In the TV stations division, is there a sales [22] group? A. Yes.

Q. During the time you were credit manager, who was in charge of the sales group? A. I am sure that that changed many times too. I recall the guys who were there towards the end. I believe in the local sales division was Gene Jankowsky, the national sales manager, I think was Art Elliott.

Q. And I take it these managers would have individual salesmen working for them? A. That is correct.

Mr. Medina: Was Robert Caulfield in that posture at one point?

A. I believe he was the local salesman.

Q. By that you mean New York? A. New York only, with CBS New York.

Q. Did individual salesmen have occasion to call on advertising agencies such as Lennen and Newell? A. Yes.

Q. What would be the object of such a visit? A. They would visit the agency to sell time on the station that they represented.

Q. Do you know specifically who called on Lennen and Newell?

*Deposition of Marvin Schrager*

[23] A. Mr. Medina just brought up the name of Robert Caulfield. I believe he was probably the CBS local salesman who called on Lennen and Newell.

Q. From your experience with CBS, would you expect such calls to be a regular thing? A. You mean calls in person now?

Q. Yes, I do. A. Depending on the situation the agency—a lot of business is conducted over the phone, of course, but I think that from—periodically a salesman does go to see his agency people.

Q. Do you happen to know if it was a practice of CBS for a salesman who visited an agency to file a contact report or any kind of written record of his visit? A. I think they probably did. I am not certain. I have heard it mentioned at CBS that they did this for a while. I don't know which period of time.

Q. Did your office ever have occasion to advise the sales people to desist in making sales to Lennen and Newell? A. I believe that was done towards the end of Lennen and Newell's life.

Q. Did such an instruction originate in your office? A. Yes. Or by my office it would probably have been [24] the controller.

Q. Would he have or did he seek your advice on that? A. Yes.

Q. Now, would that have been Mr. Charles Cadlac? A. No, I believe it was Maurice Reid, under his reign.

Q. Well, would you tell me to the best of your recollection what that situation was, was there a face to face meeting or did you send him a memorandum? A. No, as I recall it was a face to face meeting. Well, we discussed this as soon as we became aware of the extreme difficulty that Lennen and Newell was in. I discussed it, I mean, we discussed should we or should we not continue to extend credit to Lennen and Newell.

Now, up until a certain point we were satisfied that we had nothing to lose by extending further credit to them because they had guaranteed that the current bills would be paid on a current basis. We—

Q. Just pause for that one moment. A. Yes.

Q. You say guaranteed. Was this an oral representation? A. I am trying to think now. I think certain [25] advertisers set up escrow accounts where we were assured that any money that was paid to Lennen and Newell would have to be turned over to us.

Q. Can you fix that in time? A. Not really with a date but I know it was near the end. After we became aware that they were in bad financial condition, very bad financial condition.

Q. Would you say this was late 1971 or early 1972? A. It was probably around the fall of 1971.

*Deposition of Marvin Schrager*

Q. All right.

At some point you and Mr. Reid had a meeting and would you go back to telling us about that which lead to Mr. Reid's advice to the sales people to stop making sales. A. That happened I would say rather later, maybe late 1971 or early 1972.

Q. Was anyone else present at this meeting? A. I don't recall.

Q. Was Mr. Reid's advice to the sales division reduced to writing? A. That I don't—I am not sure of either. Actually I don't even think it mattered at that time because I doubt if there was even any business coming out of Lennen and Newell by that time. It was just, you know, we say of course from this point on we won't take any business [26] from them or something of that effect. Whether he called the salesmen or wrote to them.

Q. Had you had occasion to do this before, cut somebody off, an agency? A. Of course.

Q. Would you tell your sales people to cease and desist and that you don't want any more business from that particular agency? A. Right.

Q. Isn't there some written notation? A. We would normally send out to the salesman involved. In fact it—

Q. If there was such a memo, would it normally go from your office or from the controller? A. It could have gone from either office.

Q. When things get bad enough you say tell them to stop, is what it comes down to? A. Right. Right.

Q. Okay.

You just can't from your memory fix when that occurred in the case of Lennen and Newell. A. No, I can't. Or whether it actually occurred and maybe it wasn't necessary because by the time we decided to do it they might not have been soliciting any [27] business.

Actually, there was a point where Lennen and Newell after they were in trouble in 1971, after we were aware of the problem, that they did make payments on their current bills, knowing that if they did not they would be immediately cut off, even on the accounts which did not have the escrow accounts set up they were paying those bills upon receipt.

Q. It was? A. It was the old stuff.

Q. The arrearage was not taken care of? A. Which was never paid, right.

Q. Is Mr. Maurice Reid presently the controller? A. I believe so.

*Deposition of Marvin Schrager*

Q. Well, I don't have any further question but I would request that a check be made to see if the type of notice the witness described exist.

Mr. Medina: It will be done.

Mr. Loflin: Of course I request the opportunity to examine that if it be found.

Mr. Medina: I have a few questions.

*By Mr. Medina:*

Q. Mr. Schrager, I show you some documents which have been marked Exhibit OO consisting of memoranda [28] starting November 9, 1971 and ending February 15, 1972, copies of which I previously forwarded to you.

Does that help refresh your recollection as to when the meetings which you have described with Mr. Speirs and the representatives of Lennen and Newell took place in 1971? A. Okay. I see there was a meeting here October 29th. I think I said it was I think I had said earlier that it was around September, October 29th was the correct date.

Q. That would be the first meeting? A. I believe so.

Q. Now, insofar as these memoranda show you present at some of the meetings and I have given you copies of this memoranda previously, does it correctly reflect what actually happened at those meetings? A. Yes, they do.

Q. Now, you talked about extending credit. On whose credit did you rely in connection with the transactions? A. We always relied on the advertiser's credit—well with the agency too. I would say this if there was an advertiser that we knew to be in bad financial condition we would never accept an order.

[29] Q. No matter how good the credit? A. No matter how good the agency was. We of course realize that if the agency doesn't get paid from the advertiser we are not going to get paid. How could we possibly get paid.

By the same token, if an agency was known to be in bad financial condition and came up with an advertiser that looked good, what we would probably do was to ask for a guarantee from that advertiser.

Mr. Medina: That is all.

Mr. Loflin: I have no further questions.

I would note also, Mr. Medina, that the witness referred to the salesman's contact reports and since our next witnesses are going to be in the sales end, I would appreciate it if some effort be made to locate any such contact reports as to Lennen and Newell

*Deposition of Marvin Schrager*

for the periods 7—1971 on through the last report whenever that was. If it would be helpful I think to have those before we go into the sales.

Mr. Medina: You will be provided copies with them if we can locate them prior to the next set of deposition.

[30] The Witness: As I said, I am not sure whether they were written reports or oral reports. I am sure if a salesman went to the agency he should have come back and told his boss something about what happened there.

Mr. Loflin: Thank you very much.

(Time noted: 10:40 a.m.)

STATE OF NEW YORK      }  
COUNTY OF NEW YORK      } ss.:

[s] MARVIN SCHRAGER

Subscribed and sworn to before me  
this 4th day of October 1973.

DANIEL E. MULHOLLAND, NOTARY PUBLIC, State of New York,  
No. 41-2806725, Qualified in Queens County, Cert. filed in New York  
County. My Commission Expires March 30, 1977.

[s] DANIEL E. MULHOLLAND

*Deposition of Marvin Schrager*

[31]

## CERTIFICATE

STATE OF NEW YORK      }  
COUNTY OF NEW YORK      } ss. :

I, FRANK W. PARKER, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That MARVIN SCHRAGER, the witness whose deposition is herein-before set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of September, 1973.

[s]    FRANK W. PARKER  
Frank W. Parker

**Deposition of John Ginway**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, INC.,  
Plaintiff,  
—against—  
STOKELY-VAN CAMP, INC.,  
Defendant.

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Examination of JOHN GINWAY, witness, taken by Defendant pursuant to oral stipulation, at the offices of Columbia Broadcasting System, Inc., 51 West 52 Street, New York, New York, on September 19, 1973, at 10:30 a.m., as taken by Selma Perlstein, a Certified Shorthand Reporter and Notary Public of the State of New York.

[2] *Appearances:*

CRAVATH, SWAINE & MOORE, Esqs.,  
Attorneys for Plaintiff,  
One Chase Manhattan Plaza,  
New York, N. Y. 10005  
By: HAROLD R. MEDINA, JR., Esq.,  
RICHARD HIRSCH, Esq.,  
Of Counsel

LORD, DAY & LORD, Esqs.,  
Attorneys for Defendant,  
25 Broadway,  
New York, N. Y. 10004  
By: MURIEL BELL, Esq.,  
Of Counsel

*Also Present:*

MARTIN FRANK, Esq.,  
Columbia Broadcasting System, Inc.  
Law Department

*Deposition of John Ginway*

\* \* \*

JOHN GINWAY, witness, called by the defendant, being first duly sworn by the Notary Public, was examined and testified as follows:

*Examination by Ms. Bell:*

Q. Would you state your name and address for the record? A. My name is John R. Ginway. I live at 55 East 76th Street, in New York City.

Q. What is your present employment, Mr. Ginway? A. I am a salesman for CBS Television Network.

Q. For how long have you been a salesman at CBS? A. I have been a salesman for approximately 10 years.

Q. Has the nature of your position been substantially the same during those 10 years? [4] A. It has.

Q. Prior to that, can you tell me where you were employed? A. Yes. I was a salesman at Channel 2 for WCSS here in New York.

Prior to that, I worked at the Katz Agency as a television representative. The Katz Agency is a station representative.

Prior to that, I was a sales service representative at NBC.

Q. Coming back to your duties at CBS in the Sales Department, can you tell me generally what your duties are and have been for 10 years? A. Yes. I am assigned specific agencies, advertising agencies, that is, my responsibility is to call on these agencies and secure business for CBS Television Network.

Q. Do I understand there is a separate sales force for the owned and operated stations at CBS? A. That is correct. The only thing I sell is coast-to-coast television coverage.

Q. And when you sell television advertising on network programs, do these sales include network programs that are owned and operated stations? [5] A. Yes.

Q. Do the representatives of the station division sell that type of advertising with respect to local stations? A. With respect to owned and operated stations? I need a clarification of that point.

Ms. Bell: Off the record.

(Discussion off the record.)

A. Generally speaking, we sell announcements that appear in the body of a network show. They will sell an announcement that comes between the network shows, such as station breaks and things of that nature.

*Deposition of John Ginway*

Q. "They" being the Sales Division or force representing the stations? A. Representing the owned and operated division.

Q. Are there any additional sales offices outside of New York that handle network sales? A. Yes, there are.

Q. Could you tell me what their function is? A. Primarily, the same function as mine, located in Chicago, Los Angeles and Detroit.

Q. I have heard the term, "Account Executive sales people." A. That's a term that's listed in the telephone [6] directory.

Q. That is the term that you use for out-of-town offices? A. No. That's what our title actually is. I guess salesmen are called Account Executives.

Q. Then the function of the sales offices in Chicago and St. Louis is substantially the same as yours? A. I don't know where you got the St. Louis.

Q. You said Chicago? A. Detroit and Los Angeles.

Q. Their function is substantially the same as yours? A. Yes.

Q. Do you know if they contact agencies to make sales? A. To the best of my knowledge, they do.

Q. Do you, as a general practice, also contact the agencies' clients directly? A. In some instances, we do, and in some instances we don't. It is a matter of a particular client at a particular time and a particular set of circumstances.

Q. Getting into this particular matter, did you contact Lennen & Newell with regard to the sale of network advertising? [7] A. Yes.

Q. Did you contact Lennen & Newell with respect to sales to their client, Stokely-Van Camp? A. Yes.

Q. Was there anyone in particular at Lennen & Newell that you saw regarding Stokely-Van Camp's advertising? A. Yes. My regular contact at Lennen & Newell; his name was Nat Strom.

Q. Did you at any time contact or communicate with anyone at Stokely-Van Camp? A. No. I never have.

Q. Do you know if anyone from any of the out-of-town sales offices would have contacted either Lennen & Newell or Stokely-Van Camp regarding sales of advertising to Stokely-Van Camp? A. I was informed yesterday that someone had.

Q. I see. Do you know who that was and when such contact was? A. No. I don't know when it was, but I know the name: a Leon Luxenberg.

Q. What office is he from? A. He is from our Chicago Office at this time.

*Deposition of John Ginway*

Q. Do you know if he contacted the agency or [8] whether he contacted Stokely or both? A. I can't recall. I do not know.

Q. When you contact a sponsor directly, is there any such a memoranda of the contact or communication that is regularly made? A. We have established that system now. However, the period we are talking about, we did not, or I did not, let me put it that way.

Q. Do you know if out-of-town sales people made such a memoranda during the period 1969 to 1971? A. I didn't know until yesterday that he did, quite honestly.

Mr. Medina: I think what Mr. Ginway is referring to is the memorandum of May 17, 1971, by Mr. Luxenberg, a copy of which has been supplied to you, Ms. Bell.

Ms. Bell: May I ask, Mr. Medina, whether this represents the only such memorandum in the records of CBS concerning contacts?

Mr. Medina: That is correct.

Q. Mr. Ginway, did you speak to Mr. Strom at Lennen & Newell about sales to any other clients of that agency? A. Yes.

[9] Q. You did. Can you tell me, as part of your sales practices, whether you would put forth a suggested program for advertising for considering by Mr. Strom for his various clients? A. They are all handled on an individual basis; that is, marketing plans are formulated by the Agency. I guess there's, as far as I know, the Agency, depending on sales figures they are privy to will go to specific clients and bring back a budget for the purchase of time with certain specific goals in mind. Mr. Strom would say, "John, I have 'X' number of dollars for either prime time or daily time for 'X' client that I want to spend during this period of time." Then I would respond to him with my suggested plan and we would begin a negotiation.

Q. Did you ever propose a plan that involved a sale of advertising time for various clients with the understanding that Lennen & Newell would apportion the time, or spots, to its particular clients? A. Not to my knowledge; never.

Q. Do you ever recall discussing any suggested sales on a joint basis where Lennen & Newell clients might share the purchase? A. Do you mean by that, Lennen & Newell buying [10] bulk time from CBS and saying, "I am going to assign this company 'A' and this portion of it to company 'B?'"

Q. Yes. A. No.

*Deposition of John Ginway*

Q. Let me direct your attention to a copy of a—— A. Sales order.

Q. Sales order; yes, and which is contained in booklet of Primary Documentary Exhibits as Exhibit A.

Ms. Bell: Off the record.

(Discussion off the record.)

Q. (Continuing) I also call your attention to Exhibits B, C and D and E. In that booklet, I believe they refer to the same transaction and indicate at what point the sales order would have been drawn up with respect to your negotiations on that transaction. A. I don't know what you mean by that. How long were we in negotiation? Would you be a bit more specific.

Q. At what point would this be drawn after you had an understanding or deal? A. A sales order is drawn up when the final sales negotiations had been concluded; that is the end of the ball game.

[11] Q. This particular transaction, can you tell me, was that negotiated between you and Mr. Strom? A. Yes, it was.

Q. Were you in communication with anyone representing Stokely-Van Camp with respect to this transaction? A. No. To the best of my recollection, I have never met anyone from Stokely-Van Camp.

Q. Before I turn to other exhibits, can you explain the notation at the bottom of the sales order. It says: "Cost for network color integration and regional feed origination charges to be billed to Lennen & Newell as Stokely-Van Camp/Reynolds Metals?" A. Yes. The Stokely-Van Camp company did not have distribution in the Northeast for pork and beans, and also various products. In order to have my network accept any order, I had to find a match so I could accommodate Stokely in the rest of the country. Stokely, in my mind, had committed to buying the entire country. However, we would attempt to sell off the Northeast to another advertiser, so that we could accommodate the Stokely-Van Camp order, and we happened in this instance to be successful in selling it to the Reynolds Metals Company.

[12] Now, there is an additional charge to originate; two feeds, one going to the New England leg of the network and one to cover the rest of the network. Stokely-Van Camp and Reynolds Metals split the fee equally, because the Reynolds Metals Company was doing this as an accommodation.

Q. Then, when you negotiated the transaction with Mr. Strom, was the exclusion of these several stations in the—— A. Northeast.

Q. (Continuing)—Northeast agreed upon prior to your concluding an agreement? A. I can't really recall the exact sequence that took place in this thing.

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Q. You said you understood Stokely was committed to buying the entire network; and I am not sure I understand whether the time charges or package price was arrived at with the inclusion of those stations, or whether some deduction was made therefrom.

Ms. Bell: Off the record.)

(Discussion off the record.)

A. I am certain that this was done on a fair and equitable basis. I am certain that this approximately represents the entire network, except for the Northeast, [13] which the Reynolds Metals Company did pick up and probably paid the difference to make up the cost of the Northeast.

Q. When you say this, you are referring to the package price?  
A. Yes.

Q. Do you know or recall whether the advertising on these particular Northeast stations was sold to Reynolds and paid for by Reynolds.  
A. Yes.

Q. Was that transacted through Lennen & Newell? A. Yes.

Q. Was that transacted through Lennen & Newell as part and parcel of your negotiations on the package sale, or do you recall if it was? A. In this instance, it was handled by the same man; whether the sequence, whether it happened at the same time or a bit later is something I can't recall. It was a short interval in an event.

Q. Turning to Exhibits C and D previously referred to, I note that the Exhibit C is a May 4th letter from Lennen & Newell, and Exhibit D is a response to that letter, apparently, from Mr. Dillon. I call your attention to the third—

[14] Mr. Medina: Both communications are from CBS to Lennen & Newell, both "C and D."

Ms. Bell: I am sorry. You are right.

Q. I call your attention to Exhibit B, which is a May 4th letter from Lennen & Newell, and Exhibit C, which is a letter from CBS dated May 25th.

If you would look at those letters, I wonder if you can tell me whether you were involved in the sending of the letter by CBS in respect to the contract for the sale of advertising to Stokely previously testified to? A. No. I was not responsible for sending the contract out.

Q. Did your function or duties usually end with the consummation of the order? A. The issuing of the sales order.

Q. The issuing of a sales order. Do you know whether it is usual to proceed with sale of network advertising in the, let me say, whether it is usual to acquire a signed contract before you proceed to televise

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advertising which had been purchased to the network? A. No. It is not necessary to acquire a signed contract prior to telecasting on the network.

Q. I take it it is not unusual? [15] A. It is not unusual.

Q. Let me call your attention to Exhibit F, which is a sales order dated April 12, 1971, which apparently refers to a second transaction for the sale of television advertising to Stokely-Van Camp.

Can you tell me if you negotiated this sale? A. Yes.

Q. I call your attention to a notation on the bottom of the sales order regarding billing certain charges to Lennen & Newell, or Stokely/ Reynolds Metals.

Does that note refer to a similar situation where certain stations were excluded in the prior transaction? A. Yes. It does.

Q. And circumstances regarding the billing of those charges would be the same? A. Yes.

Q. Can you tell me, as part of your duties, were you familiar with the status of Lennen & Newell payments of bills sent to it by CBS for television advertising? A. Generally speaking, no. However, there was an instance when I was asked if there were any problems, and I said not to my knowledge.

[16] Q. Can you tell me who asked you that question? A. Mr. Nat Strom, my principal contact at Lennen & Newell.

Q. Can you fix a time when that conversation took place? A. To the best of my recollection, I think it might have been some time in October, '71.

Q. Can you tell me a little more as to what you recall of that conversation? A. Yes. He said, "John, without causing any excitement, could you walk down to Mr. Lou Werle's office and find out whether or not payments are being made on behalf of Reynolds Metals for the television time they have contracted for?"

Q. Can you tell me how you understood this question? Did that refer to direct payment by Reynolds Metals to CBS? A. No.

Q. Did not Lennen & Newell represent Reynolds Metals? A. They did.

Q. Were you familiar with Lennen & Newell's practices regarding billing their clients? A. No, absolutely not.

[17] Q. Did you understand Lennen & Newell would bill their clients directly for television advertising? A. I don't know what procedure they used whatsoever. I never made it a point to.

Q. Can you remember anything else about the conversation with Mr. Strom? A. I guess my reply to him was that Mr. Werle and their people have things under control, or things in hand.

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Q. Was it your understanding that Mr. Strom, as a representative of Lennen & Newell, would not be familiar with whether Reynolds Metals was paying CBS for television advertising purchased by it? A. Would you rephrase that for me?

Q. Did you understand that Lennen & Newell would have no knowledge as to whether its client, Reynolds Metals, was paying CBS for television? A. To the best of my knowledge, the Reynolds Metals Company never paid CBS directly. I assume they went through their agency.

Q. I understand you testified Mr. Strom of Lennen & Newell asked you to check with CBS as to the status of the Reynolds' payments? A. No. He asked about agency payments. Whether Lennen & Newell paid for the Reynolds Metals schedule that was running on the CBS Television Network.

Q. Now, I understand.

In addition to your response to Mr. Strom, did you make any efforts to check into the question of payments for Reynolds with Mr. Werle or with anyone else at CBS? A. Yes, I did. I stated that previously.

Q. I understood you to say that you understood they had everything under control. Is that the response you made after speaking to Mr. Werle? A. It is.

Q. In your conversation with Mr. Werle, did you discuss the status of the Lennen & Newell account with CBS? A. No. I was asked to check on one particular client, and that is what I did. I wasn't boring into anyone else's business at that time.

Q. Did there come a time when you did learn that Lennen & Newell was behind in its payments to CBS? A. To the best of my knowledge, no.

Q. Did there come a time when you received any [19] instructions regarding further sales to Lennen & Newell? A. No, I don't believe so. I proceeded as though there was no particular problem with regard to collection.

Q. Did you continue to sell or to call on Lennen & Newell for the purpose of selling advertising for its clients through 1971 to the end of 1971, do you recall? A. To the best of my knowledge, I did.

Q. Do you recall if you negotiated any such transactions to a conclusion? A. I am sure if there was business there, I did. I can't give you specifics.

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Q. Do you recall, in 1972, if there came a time when CBS sales to Lennen & Newell ceased? A. I think when we read it in the press, I think we ceased at that time.

Q. When you say you read it in the press, what does that refer to? A. I guess either the "Advertising Age," or some one of the trade journals that it would appear.

Q. Are you referring to Lennen & Newell's bankruptcy or what else are you referring to? A. I guess that is what I am referring to; yes.

Q. Can you fix in your mind approximately when [20] this occurred? A. I can't, truly.

Q. Did you have any discussions with any of the representatives from the station's division regarding the status of Lennen & Newell payments with respect to their sales to it? A. No.

Q. Is it usual for you to confer, or talk, to the sales personnel from the stations division concerning various agencies or clients. A. Generally speaking, no. I don't even know the names of the chaps from the stations division calling on Lennen & Newell because we are calling on two separate sections of the agency.

Q. You function separately? A. Independently; yes.

Q. Did you ever learn, or hear, of any instances where Lennen & Newell clients were making direct payments to CBS for television advertising? A. I believe the Florida Citrus Commission was making direct payments to CBS.

Q. Is that the extent of your information or did you learn anything more about that? A. That is the extent of my information.

[21] Q. Do you recall when it was that you learned that fact? A. No, because it was done in an offhand manner that the Florida Citrus Commission had decided to make payments directly to CBS.

Q. Did you not learn anything about the reason for that change in payment? A. No.

Q. I think you testified, if I am correct, that you were familiar with Lennen & Newell's practice of billing their clients, is that so? A. That's correct.

Q. Did you ever learn that Lennen & Newell was applying monies or payments received from its clients to current purchases or other obligations? A. I would not normally get involved with anything like that. I have no knowledge of that, quite honestly.

Q. Did you learn at any time of any creditors' meeting at Lennen & Newell, say, in the Fall of 1971? A. Mr. Werle had advised me that he was going to Lennen & Newell for a series of meetings.

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Q. That was in his department? A. That's right. Collection is his responsibility. Sales is my responsibility. I didn't get involved in his [22] thing, and he never got involved in mine.

Q. With respect to your negotiations for sales of television advertising, specifically with Lennen & Newell, was there any discussion in these negotiations concerning the amount of commission? A. No.

Q. Is there a standard practice in the industry regarding the amount of commission that is payable to the agency? A. By CBS?

Q. Yes. A. Yes. There is a standard, I believe.

Again, I don't know what it is. You know, it is an industry standard.

Q. Is the amount of commission, or percentage, or manner of payment at all a part of the negotiations when you are discussing the sale of time with an agency for Lennen & Newell? A. Generally speaking, no.

Q. Do you understand then that, when you are speaking to Mr. Strom at Lennen & Newell, that he understood the standard commission would be payable to the agency? A. I have to assume so.

[23] Q. He never said it or mentioned it? A. No.

Q. That is true even when you are dealing with a single package price as opposed to time charges for individual stations or programs? A. Yes. I believe so. This is not my area, but I believe this is the way we do it.

Q. In the transactions that you negotiated for network sales, were they usually or generally on a package price basis? A. They usually have been done on a gross basis, which includes, in my figures, the agency commission.

Q. When you say your figures, could you explain a little more to me how the price is arrived at or how you arrived at a price to form the basis of your negotiations? A. Yes. CBS has a price list and has certain merchandise available for sale and, depending on the advertiser's need or criteria that has been outlined by the agency, I will make a presentation for a particular price.

I will put my audience estimates down to tell him just exactly how many noses he is reaching. He will put down his estimates as to how many noses he thinks [24] he is going to be reaching based on his knowledge of the business; and, at some point, we will negotiate a package that is a fair and equitable deal, we hope, for both parties. Then I bring this order back to my management, and if they think it is an acceptable order, they accept it; and I will tell my agency that the package, or whatever it may be, is an acceptable order. When we put a

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price on these packages, that is a price that includes the agency commission.

Ms. Bell: That answers it very fully.

(Time noted: 11:10 a.m.)

\* \* \*

[s] JOHN GINWAY

Subscribed and sworn to before me  
this 13th day of November, 1973.

MARTIN FRANK, NOTARY PUBLIC, State of New York, No. 31-  
6381003, Qualified in New York County. Commission Expires March  
30, 1979.

[s] MARTIN FRANK

*Deposition of John Ginway*

[25]

CERTIFICATE

UNITED STATES DISTRICT COURT      }  
SOUTHERN DISTRICT OF NEW YORK      } ss.:

I, SELMA PERLSTEIN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That JOHN GINWAY, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of October, 1973.

[s]    SELMA PERLSTEIN  
Selma Perlstein

[26] September 19, 1973

*Deposition of John Ginway***I N D E X****WITNESSES**

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**EXHIBITS**

(There were no new exhibits introduced in this examination.)

